Supreme Court of the United States

OCTOBER TERM, 1960

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOACHIM RIBEIRO,

Petitioner,

against

UNITED FRUIT COMPANY, a New Jersey Corporation, and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Respondents,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on November 21, 1960.

Opinions Below

The opinion of the Court of Appeals is reported at 284 Fed. 2d 317.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on November 21, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

Questions Presented

1. In the exercise of the supervisory power of the Supreme Court, does the interest of justice require correction of obviously injurious errors and review on appeal, or does a litigant lose his right of review by appeal; of errors committed by a Trial Court, when, in fact, exceptions are taken to the errors committed but in some instances not in the precise words "I except"?

2. Is it error for a Trial Court to inform trial counsel that several questions, seven in number, will be submitted for a jury's consideration, and then, on the Court's own initiative, give to the jury but three questions, two of which are objected to, particularly where the clear and precise meaning of the word "inimical" is given a different meaning than that given by the Supreme Court over the objection of counsel?

3. Is the consent to the submission by a Trial Court to a jury of one of several questions, a waiver of objection of several other questions to which specific exception had been taken?

4. Which of the several conflicting opinions by various Circuit Courts of Appeal (set forth in further detail under Point 6 of this Petition) is correct as to construction of Rules 49 and 51 of the Federal Rules of Civil Procedure?

Reasons for Granting the Writ

1. There is conflict of opinion by various Circuit Courts of Appeal.

2. The failure to use specific verbiage in taking exceptions has been erroneously asserted as a basis for denying to a litigant the right of review by appeal, when, in fact, adequate exceptions had been taken. This constitutes a denial of justice where, obviously, an injurious error was committed by a Trial Court.

3. There is great confusion and conflict of opinion by various Circuit Courts of Appeal as to the meaning and manner in which Rule 49 and Rule 51 of the Federal Rules of Civil Procedure are to be applied in our Federal Courts.

4. The Trial Court committed error by a radical departure from the correct interpretation of the word "inimical" and changed and limited the meaning of said word as expressed by the Supreme Court of the United States, and gave it a meaning far different and in conflict with the meaning given by said Supreme Court. The Court below refused to pass upon this question although urged as error.

5. The Trial Court erroneously usurped the function of the jury in total disregard of well established law, Rules of Procedure and admission of evidence over strenuous objection.

Facts

The plaintiff was a night watchman on the S.S. PARISMANIA; defendant's barge No. 23 was tied alongside this vessel to bunker it. Its crew consisted of two men designated by Esso as "Captain" and "Mate". The bargemen, in order to prepare for the fueling operation, placed a ladder on the deck of the barge leading to the deck of the ship. The bargemen prepared the vessel for the pumping of the fuel and returned to the ship.

Plaintiff had no duties on board the barge.

Plaintiff climbed down from the ship to the barge. He testified he was injured while returning to his ship because of the defective and unseaworthy condition of the ladder.

Afte a long trial lasting from November 23 through December 4, 1959, the Trial Court advised counsel on both sides that he would submit a special verdict of seven questions.

Later and after argument by counsel, the Trial Court decided to submit the verdict in "two sections", the 1st. question of "liability" and secondly, the issue of "damages".

The charge states:

> "There are seven questions, which I will discuss with you. I shall first discuss three of these questions and ask you to return a special verdict of yes or no to each one of them. Depending upon your answers to these questions, I shall submit further questions for your determination" (Charge 8a).

The three questions and the answer of the jury are as follows:

> "Question 1. Did the captain of the Esso barge 23 invite the plaintiff on the barge?
> Answer. No:
> Question 2. Did the Captain have authority to invite the plaintiff aboard the barge for a purpose other than in furtherance of the owners?
> Answer. No.
> Question 3. Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?
> Answer: Yes."

The only issue that counsel for plaintiff was willing to have the jury answer was whether the presence of the plaintiff on the barge was for a purpose not inimical to the legitimate interests of the owner as construed by this Court in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 623, 79 S. Ct. 406.

The objections of plaintiff to the three question verdict are found in the footnotes of the opinion of the Court below as follows:

> "After the trial judge announced his intention of submitting the question of liability first, and then

submitting the issue of damages only if liability was established, the following colloquy took place:

'Gentlemen, do you understand what the questions are that we are going to put to them?

Mr. Rassner: I do, your Honor.

The Court: It won't be necessarily in that language, but that is going to be the substance of it.

Mr. Rassner: May I make a comment as to that, your Honor.

The Court: Yes, sir.

Mr. Rassner: In the main I feel that your Honor's thoughts should facilitate matters. However, as a matter of protecting my client's rights I would like to express one objection. I feel that the question of whether or not the plaintiff was aboard that vessel lawfully, rightfully is a matter of law and not a matter of fact, and therefore I object to so much—I consent to everything else but object to so much—

* * * *

Mr. Rassner: I object to the submission of whether or not the plaintiff was lawfully or properly aboard the vessel to the jury on two grounds: first, that I believe it was error for the Court to permit any evidence as to the rules and regulations of the company as not binding on the plaintiff and in no wise lessening the authority of the master to invite or permit the plaintiff aboard the vessel, and I use the words 'invite or permit' advisedly; secondly, that whether or not the plaintiff was there with the original express invitation of the master or with his consent is immaterial so long as he was there for purposes not inimical to the interests of the owners of the barge 23.

With that one reservation—

Mr. Rassner: For the record, I would like to make my position clear.

The Court: I don't know what it means, "for the record." In other words, you don't mean it seriously?

Mr. Rassner: No. I object to a question being submitted to the jury which in any wise gives them the duty or right to pass upon whether or not the plaintiff was aboard the vessel rightfully or wrongfully other than in a manner inimical to the interests of the barge 23.'

> "Plaintiff objected to the submission of the first question on the ground that it was immaterial whether he was an invitee or a licensee or even a trespasser. The only test was whether he was on board for purposes 'inimical to the ship's interest.' He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the captain to invite him and not the actual intercompany limitations on the captain's authority that would control."

After the charge counsel for plaintiff again excepted to the submission of questions 1 and 2 on the ground that neither question is a proper question in the case at bar. "They are irrelevant, immaterial and outside the issues of this case" (App. 18a).

As to question 3 counsel for plaintiff stated:

> "Plaintiff takes exception to so much of the Court's charge as makes comment,—this has particular reference to question No. 3—on the conversation had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, *particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted;* furthermore, *that any conversation that took place before there was this absolute change of status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters changed the status, if there was a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest.*" (App. 19a) (italics ours)

Later the following colloquy took place between counsel for plaintiff and the Court:

> "Mr. Rassner: I have made my objections on the record. Now I have one more; that there be a direc-

tion as to the third question and a direction that the plaintiff was aboard barge 23 for purposes not inimical to the interests of the barge owner as there is no dispute that he was there for purposes not inimical to the interests of the vessel." (App. 22a)

"Plaintiff takes exception to the Court's refusal to charge the jury to find that the plaintiff was on board the vessel for purposes not inimical to the interests of the owner." (App. 23a)

After the jury had been deliberating for some time the jury sent this formal communication to the Court:

"In question 3, please clarify the use of the word 'inimical' and the phrase 'for purpose'."

Upon its receipt the Trial Court discussed the note with counsel, stating:

"If you look in the dictionary I suppose in the ordinary sense 'inimical' might be 'hostile.' That means that unles you find that a person boarded a vessel unauthorizedly with a view to blowing up the vessel he was not on there for a purpose inimical. I suppose 'inimical' as used there might be almost defined as inconsistent with the legitimate interests of the owner, and I should like to hear your definition, Mr. Rassner, the definition you would like me to give to the jury.

Mr. Rassner: May I respectfully ask the court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

The Court charged the jury:

"If is very significant that your request is not for dictionary definitions of those words, but to clarify the use of those words. You know, a word used in one context may have one meaning and that same word used in a different context may have an entirely different meaning. As used in the con-

text of the charge the term 'inimical' was intended to mean 'inconsistent with' and the phrase 'for purpose speaks for itself.'

Thank you, gentlemen.

Mr. Rassner: May I have my objection noted.

The Court: The objection has been noted." (App. 28a *et seq.*)

Argument

The Court below and the Trial Court have made so many fundamental and obvious errors in passing upon the issues of fact and in determining the applicable rules of law that the judgment herein must be reversed.

Even though the actual submission of the three question special verdict was and is contrary to all proper procedure, plaintiff was entitled to a fair and impartial determination of his exact status on the barge immediately before the accident and of his legal rights created by such status.

The factual issues at the trial were:

1. Whether the plaintiff had been invited on the barge by the captain?

2. Whether there was a change in his legal status on the charge because of the undisputed evidence as to what occurred after plaintiff went on the barge. Plainitff testified that he was invited on the barge by the captain (Charge 11a) and that later he was in the galley with the captain drinking from a container of milk (Charge 11a).

   The captain admitted that he gave plaintiff a glass of milk; that he talked to him, while he was on the barge and while he was drinking the milk so given him by the captain, about living in Hastings and about his having two jobs at the time of the accident (App. 4a).

3. Whether the presence of the plaintiff on the barge was for a purpose inimical to the legitimate interest of the barge?

This statement as to the ultimate issues is not questioned by the Court below nor by the Trial Court.

Let the record speak for itself:

1. At the conclusion of the trial the Court told counsel that he would submit his proposed seven question special verdict which is proper and acceptable practice.

2. After argument of counsel to the jury and without any notice from the Court that he did not intend to submit the seven questions, the Court of its own volition decided upon the three question verdict.

3. At that time counsel for plaintiff specifically objected to the submission of questions 1 and 2 and at that time counsel told the Court in no uncertain terms that the rules and regulations of the company were immaterial; that any such rules and regulations in nowise lessened the authority of the master to invite or permit the plaintiff aboard the vessel and that the only issue was whether plaintiff was there for purposes not inimical to the interests of the barge 23 (this brief, pp. 6, 7).

4. The Court below based its entire decision on that part of the charge which is quoted in its opinion:

> "If you find that plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

In reading this charge it *must be noted* that the charge refers solely to the initial entry of plaintiff on the barge.

Counsel for plaintiff had already made his objections to that part of the charge which states:

> "In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

He had already told the Court at the time question "3" was to be submitted that the relationship between the captain of the barge and its owner and the authority of the captain were wholly immaterial and had no bearing whatsoever as to whether the plaintiff's visit was "inimical" (see "3" immediately above).

5. At the conclusion of the Court's charge counsel again stated his view of the rights of the plaintiff on board the barge when he specifically excepted to the charge as set forth herein at page .

6. During its deliberations the jury became confused as to the meaning of the term "inimical" and sent a note signed by the foreman requesting clarification as to its meaning.

At that time the Court asked counsel for plaintiff for his opinion.

Counsel told the Court:

> "They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

At that time the Court erroneously told the jury:

> "As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with'." (App. 29a)

To which charge plaintiff took objection which was noted by the Court (App. 29a).

The conclusion of the Court below that counsel for the plaintiff did not take proper exception to the charge as originally given is contrary to the record itself.

The conclusion of the Court below that counsel for plaintiff is precluded from taking any exception to the erroneous charge after the jury's request for clarification of the term 'inimical' is wholly erroneous and contrary to the decisions of this and other Courts.

The Court below avoided and evaded the determination of the plaintiff's legal status by its failure to properly examine the record and by its refusal to properly apply the law.

The specific errors of the Court below and the Trial Court will be discussed seriatim in the various points of this brief.

POINT I

This Court in the exercise of its supervisory power must reverse the decision of the Court below in the interests of justice because the rulings of such Court and of the trial Court are so obviously and injuriously erroneous.

The trial was replete with error.

From the beginning of the trial until the rendering of the final verdict after the clarification of the term "inimical" counsel for plaintiff had based his claim for recovery herein as to the legal status of the plaintiff on the barge on two alternate factual situations, namely:

1. That plaintiff had been invited on the barge by its captain in the first instance, or

2. that even though the initial entry had been unjustifiable there had been a legal "change of

> status'' resulting from what had transpired on the barge after the original entry which gave the plaintiff the same legal rights as an invited guest from the time he left the ship.

Counsel urged at all times that it was immaterial which alternative the jury adopted.

It was always his contention throughout the trial as shown by the record that a recovery could be had on either or both theories.

The Court told counsel that it was his opinion that the plaintiff

> ''stealthily got aboard this barge with a view to committing larceny and apparently he succeeded in part because he was not discovered until the captain of the barge went in there after he had completed some of his chores on the deck.'' (App. 22a)*

While the Court stated that he ''did not expound it to the jury'' the record in of itself demonstrates a concerted never diminishing attempt of the Trial Court to enforce such opinion by indirection what it could not do directly because it would be manifest error and a gross usurpation of the powers of a jury.

The attitude of the Trial Court seems to have been that as long as he could not express to the jury his own personal version of the case as outlined to counsel as above, at least he could, would and did prevent the plaintiff from presenting his claim as to his status on the barge in a fair and impartial manner.

Let the record speak for itself.

After this Court reviews the record and the law applicable thereto it is submitted that this is a case where

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* This and later references are to petitioner's appendix printed for the Circuit Court of Appeals.

this Court, in exercise of its supervisory power, must reverse the judgment of the Court below because the rulings are so obviously and injuriously erroneous.

Gibson v. *Lockheed Aircraft Service*, 350 U. S. 356, 76 S. Ct. 366.

The Court below refused to pass upon one vital ultimate issue, namely, the legal status of the plaintiff on the barge because, in its opinion, counsel for plaintiff failed to take the necessary exceptions to protect the interests of his client.

The record shows that such exceptions were taken but whether he did or not becomes and is immaterial when, as here, the errors are fundamental and obvious.

In *United States* v. *Atkinson*, 297 U. S. 157, 160, this Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

In *Dowell Inc.* v. *Jowers*, 5 C. C. A. 166 Fed. 2d 214:

> "We think that in the interest of justice the court here must act upon its own motion. So acting, we hold that the trial judge's charge to the jury constitutes reversible error."

In *McNello* v. *John B. Kelly, Inc.*, 3 C. C. A. 283 Fed. 2d 96, 102:

> "The question of liability in the present case was submitted to the jury with what was tantamount to no instructions at all. Few more fundamental errors with respect to a charge can be conceived. A holding that counsel's failure to take exception to such a procedure bound his client, would, in our opinion, result, in a gross miscarriage of justice."

To same effect:

Callwood v. *Callwood*, 3 C. C. A. 233 Fed. 2d 784, 788;

Montgomery v. *Virginia Stage Lines, Inc.*, 191 Fed. 2d 770, 774, U. S. Appeals D. C.;

Shokuwan Shimabukuro v. *Higeyoshi-Nagayama*, 140 Fed. 2d 13, U. S. Appeals, D. C.;

Hormel v. *Helvering*, 312 U. S. 552, 556.

The late Circuit Judge Frank of the Second Circuit Court of Appeals in reviewing *United States* v. *Atkinson*, *supra*, said in his concurring opinion in *Troupe* v. *Chicago D & G Bay Transit Co.*, 2 C. C. A. 234 Fed. 2d 253, 261:

> "There the Supreme Court set forth, in the disjunctive, two grounds for reviewing such errors:
>
> (1) the errors are obvious, or
>
> (2) they otherwise seriously affect the fairness, the integrity or public reputation of judicial proceedings."

One basic error committed at the trial was that the plaintiff and his counsel were never permitted to have the jury pass upon the most essential issue of fact, namely, whether there had been any change in his status after his original entry on the barge and before the accident.

This contention that this "change of status" created a proper cause for liability upon the part of the defendant, was made throughout the trial as the record clearly and conclusively demonstrates. It was repeatedly urged upon the Trial Court. No one questions or disputes this statement.

But nowhere is there any record in the trial where the jury was permitted to pass upon it.

It was omitted because the Trial Court refused to have it determined. The Trial Court purposely avoided all such suggestions of counsel for plaintiff.

Nowhere in the opinion of the Court below is it even discussed. Other incidental issues are discussed but not this one.

In common fairness, in common justice no trial should have been completed without this issue of liability due to "change of status" being determined by the jury.

This error is glaringly obvious. It is a basic fundamental issue. The refusal to have it passed upon of necessity injured and prejudiced the plaintiff.

There were many other serious and most prejudicial errors which are discussed later.

POINT II

The ruling of the Court below that the plaintiff failed to "object to the instruction originally given" defining "inimical" is contrary to the record and clearly erroneous.

The record shows (App. 19a):

> "Plaintiff takes exception to so much of the Court's charge as makes comment—this has particular reference to question No. 3—on the conversations had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted; furthermore that any conversation that took place before there was this absolute change of status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters changed the status, if there was a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest."

Later counsel for plaintiff requested the Court to direct the jury that the plaintiff was on the barge for purposes not inimical to the interests of the vessel (App. 22a and 23a).

This exception of counsel recognizes the rule of law that there can be a change of status after an original entry.

In *Bernal* v. *Baptist Fresh Air Home Society*, 275 A. D. 88, later affirmed by the Court of Appeals, 300 N. Y. 486:

> "Plaintiff's status in the camp generally was similar to that of a social guest of the defendant and as such she was a licensee. * * * However, on this record at the time of the accident herein-plaintiff was in the pantry drying dishes as part of camp routine for girls of her age, and she was at that time and place an invitee, or so a jury could find; and in such case defendant would have the common law duty to use the reasonable care due an invitee."

Restatement of Torts, Section 342, also recognizes this distinction wherein it states:

> "invites or permits them to enter or *remain* upon the land." (Italics ours.)

To same effect:

> *Ferro* v. *Sinsheimer Estate Inc.*, 256 N. Y. 398;
> *Giglio* v. *Rubin*, 278 A. D. 200 (N. Y.);
> *Supornick* v. *Supornick*, 222 N. W. 275 (Minn.);
> *Halvorson* v. *562 W. 149th St. Corp.*, 290 N. Y. 40;
> *Henry W. Cross Co.* v. *Burns*, 81 Fed. 2d 856, 8 C. C. A..

This Court in many instances has held that the status of a plaintiff is to be determined on the basis of all the relevant factors.

> *Ward* v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
> *Baker* v. *Texas & Pacific Ry. Co.*, 359 U. S. 227, 79 S. Ct. 664;

Butler v. *Whiteman*, 356 U. S. 271, 78 S. Ct. 734;
Senko v. *La Crosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415;
Grimes v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 78 S. Ct. 687;
Petty v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275, 79 S. Ct. 785.

See also:

United States v. *Mississippi Valley Generating Co.*, decided January 9, 1961.

The objection is sufficient if the Trial Court is told of the basis of counsel's claim.

Rule 46, Federal Rules of Civil Procedure;

Rule 51, Federal Rules of Civil Procedure.

In Moore's Federal Procedure, discussing Rule 51 in Section 51.04 at page 2505:

> "The rule does not require formality; and it is not important in what form an objection is made, or even that a formal objection is made at all, as long as the trial judge understands the party's position."

To same effect:

Sweeney v. *United Feature Syndicate*, 129 Fed. 2d 904, 2 C. C. A.;
Broderick v. *Harvey*, 252 Fed. 2d 274, 1 C. C. A.;
Greyhound Corporation v. *Blakley*, 262 Fed. 2d 401, 9 C. C. A.;
Pierro v. *Carnegie-Illinois Steel Corp.*, 186 Fed. 2d 75, 3 C. C. A.;
Green v. *Reading Company*, 183 Fed. 2d 716, 3 C. C. A.;
American Alliance Insurance Co. v. *Keleket X-ray Corp.*, 248 Fed. 2d 920, 6 C. C. A.;
Elgin Corp. v. *Atlas Bldg. Products Inc.*, 251 Fed. 2d 10 C. C. A. cert. denied 78 S. Ct. 1371.

7

In *American Alliance Ins. Co. v. Keleket X-ray Corp.*, 248 F. 2d 920, 6 C. C. A., the Court stated at page 924:

> "* * * Appellee takes the position that this court may not consider this issue, as appellants did not take exception to the charge when delivered by the court. We recognize that the most important purpose of Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A. is to prevent litigants from challenging on appeal the correctness of the court's charge to the jury where no objections were raised before the trial judge, thus failing to afford him opportunity to correct inherent errors. We think, however, that in the instant case the objections raised by appellants in the discussion of the charge with the district judge properly preserved the right to assign alleged errors in the court's instructions."

One objection is sufficient.

Troupe v. *Chicago D & G Bay Transit Co.*, 2 C. C. A. 234 Fed. 2d 253;

Moreau v. *Pennsylvania R. R. Co.*, 166 Fed. 2d 543, 3 C. C. A.;

Union Pac. Ry. Co. v. *Owens*, 142 Fed. 2d 145, 9 C. C. A.;

U. S. v. *Rayno*, 136 Fed. 2d 376, 1 C. C. A., cert. denied 320 U. S. 776.

Counsel for plaintiff made proper and sufficient objections to the charge of the Court as shown by the record herein quoted from (App. 19a).

This exception in and of itself was adequate.

However, counsel for plaintiff advised the Trial Court at the time the three question verdict was being forced upon him of his conception of the law involved in the case.

This too was sufficient objection under Rule 51 of the Federal Rules of Civil Procedure.

The conclusion of the Court below that counsel for plaintiff failed to object to the instruction originally given is contrary to the record and is wholly erroneous.

For this reason and this reason alone the judgment must be reversed.

The record discloses that counsel for plaintiff at various times during the trial made known to the Court his contention as to the change of status of plaintiff.

These statements are sufficient compliance with Rule 51 as long as they were given "before the jury retires to consider its verdict". Rule 51, F. R. C. P.

The cases cited sustain this contention.

These and other objections require the reversal of the judgment herein.

POINT III

Assuming *arguendo*, that the plaintiff failed to take proper exception in the first instance, the exception taken to the charge when the jury came in for clarification of the original charge is sufficient compliance with Rule 51.

The Court below conceded that counsel for plaintiff took proper exception when the jury after some deliberations sent in its written request for clarification of the word "inimical".

The record shows that at that time the Trial Court asked Mr. Rassner for his definition of the word "inimical" and that at that time Mr. Rassner stated:

> "May I respectfully ask the Court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

The Court charged the jury:

> "* * * As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with'.

Mr. Rassner: May I have my objection noted.
The Court: The objection is noted." (App. 28a *et seq.*)

The Court below in its opinion states:

> "We think that the failure of the plaintiff to object to the instruction originally given and which the jury was still permitted to accept as correct even after the charge defining inimical as 'inconsistent with', prevents the recharge from being error if in fact the court defined inimical too favorably for defendant which we do not decide."

This ruling of the Court below constitutes fatal error.

Counsel for plaintiff took proper exception in the first instance but whether he did or not becomes immaterial when, as here, the jury came in asking for instructions because apparently it had forgotten and did not remember the charge of the Court.

The situation at that time was the same as if the jury had never been instructed as to the meaning of the term.

The Court asked counsel for plaintiff for his definition and counsel for plaintiff replied giving his meaning of "inimical".

But regardless of what transpired the Court gave an improper and erroneous instruction to which counsel then took sufficient and proper exception.

The ruling of the Court below that counsel for plaintiff could not take advantage of his exception when the jury asked for clarification is wholly erroneous.

Fillippon v. *Albion Vein Slate Company*, 250 U. S. 76, 81;

Arrington v. *Robertson*, 114 Fed. 2d 821, 822, 3 C. C. A.;

Snyder v. *Lehigh Valley Ry. Co.*, 245 Fed. 2d 112, 3 C. C. A.;

Louisville & N. R. R. Co. v. *Johnson*, 81 Fed. 679, 7 C. C. A.;
Hansen v. *St. Joseph Fuel Oil & Mfg. Co.*, 181 Fed. 2d 880, 8 C. C. A.;
Baer Bros. Land & Cattle Co. v. *Palmer*, 158 Fed. 2d 278, 10 C. C. A.;
Atlantic Coast Line R. R. Co. v. *Dixon*, 189 Fed. 2d 525, 5 C. C. A.;
Palmer v. *Miller*, 145 Fed. 2d 926, 930, 8 C. C. A.;
Fitzpatrick v. *Sooner Oil Company*, 212 Fed. 2d 548, 10 C. C. A.;
Theriot v. *Mercer*, 262 Fed. 2d 754, 5 C. C. A., cert. denied 79 S. Ct. 941;
Seaboard Air Lines R. Co. v. *Bailey*, 190 Fed. 2d 812, 5 C. C. A.;
Chicago B. & Q. Ry. Co. v. *Kelley*, 74 Fed. 2d 80, 84, 8 C. C. A.;
Smulczeski v. *City Center of Music*, 3 N. Y. 2nd 498;
Greenwood v. *Inter Ocean Insurance Co.*, 89 S. E. 2d 455, 461.

In *Fillippon* v. *Albion Vein Slate Co.*; 250 U. S. 76, page 81, 39 S. Ct. 435, 436, 63 L. Ed. 853, the Supreme Court said:

"We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordi-

nary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction." (*Arrington* v. *Robertson*, 114 F. 2d 821, at pp. 822, 823.)

In *Arrington* v. *Robertson, supra*, at page 823:

"The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given. The inquiry of the jury and the trial judge's response were not reported by the court stenographer. The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present."

In *Palmer* v. *Miller, supra*, at page 930:

"• • • Where, after the submission of a case to a jury, the jury is given additional instructions or the court has the instructions which were given read to the jury, the case, in a practical sense, is not finally submitted to the jury until that time. If it then appears that an instruction which is then given or repeated is erroneous and should be corrected, we have no doubt that a party has the right to object

to the instruction at that time and that it is the court's duty to correct it."

In *Fitzpatrick* v. *Sooner Oil Co., supra*, at page 551:

> "When a jury returns to the courtroom with the request for further instruction, the presumption must be that the only uncertainty in the jury's mind is with respect to the matter about which further instruction is sought and the court is required only to fairly answer the question asked by the jury."

In *Smulczeski* v. *City Center of Music Inc., supra*, the Court said:

> "To obviate an erroneous instruction upon a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it."

In *Louisville & N. Ry. Co.* v. *Johnson, supra:*

> "When it is proposed by a further instruction to *correct an erroneous* charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake." (Italics ours.)

Here the Trial Court had an opportunity to withdraw or correct its prior erroneous instruction to preclude any inference that the jury might have been influenced by it.

In *Theriot* v. *Mercer, supra*, the Court held that it was prejudicial error when the Trial Court had not made the attempt to correct the erroneous charge until the jury had been out for more than 30 minutes.

The presumption follows as matter of law that an erroneous charge is prejudicial.

Fillippon v. *Albion Vein Slate Company, supra;*
Blodgett v. *Pinkerton Tobacco Co.*, 79 Fed. 2d 945; 6 C. C. A.;
Baltimore & Ohio Ry. Co. v. *U. S.*, 242 Fed. 1, 6 C. C. A.

The decision of the Court below that petitioner cannot avail himself of the error of the Trial Court in giving the erroneous definition of "inimical" when the jury came in for the express purpose of having the word clarified is fatal error for which the judgment must be reversed.

POINT IV

The ruling of the Court below approving the submission of the three question verdict was contrary to Rule 49 of the Federal Rules of Civil Procedure; such three questions in and of themselves were prejudicial to the rights of the plaintiff.

Upon conclusion of the testimony the Trial Court advised counsel that it would submit the issues to the jury by a seven question special verdict, a procedure permitted by Rule 49 of the Federal Rules of Civil Procedure which specifically requires

"a special written finding upon each issue of fact."

AFTER ARGUMENT and without notice to either counsel and contrary to all federal rules and procedure and now expressly prohibited by *Miner* v. *Atlass*, 80 S. Ct. 1300, the Trial Court permitted counsel to argue the expected seven question special verdict to the jury and then arbitrarily and without one word of warning prepared and submitted the three questions for its ultimate decision.

Counsel for plaintiff was trapped.

The trial had gone on from November 23rd through December 4th. Counsel, rather than force a mistrial, determined that he would and did consent to the submission of one issue and one issue only, namely, whether plaintiff was on the barge "for purposes not inimical to the owners of the barge".

The Court below states that counsel could have asked for the submission of additional facts to the jury.

Rule 49 specifically calls for the submission of all issues. The Trial Court had determined what those issues were to be when he prepared the seven questions but when he decided upon the three, there was nothing further for plaintiff to do except to make the objections that were made before the questions were submitted.

He objected to all the questions as prepared by the Judge but did consent to the one question, namely, whether plaintiff came within the ruling of this Court in the *Kermaree* case, *supra*.

As stated plaintiff was trapped and could take no other nor different course.

Rule 49 and the applicable decisions of this Court determine that there can be no piecemeal litigation.

Miner v. *Atlass*, *supra*, determines that not even the District Courts as such can amend federal rules of procedure.

In *Magenau* v. *Aetna Freight Lines Inc.*, 360 U. S. 273, 79 S. Ct. 1184:

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

In *Ward* v. *Atlantic Coast Line Ry. Co.*, 80 S. Ct. 789, 792:

> "The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d, Sec. 220(2)(i) and the issue is one for determination by the jury on the basis of all the relevant factors."

In *Baker* v. *Texas & Pacific Ry. Co.*, 359 U. S. 227, 79 S. Ct. 664, 665:

> "Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law."

In *Hodges* v. *Easton*, 106 U. S. 408, 412-413:

> "Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law."

Plaintiff is entitled to a proper submission of all issues to the jury.

Magenau v. *Aetna Freight Lines Inc., supra;*
Schulz v. *Pennsylvania R. R. Co.*, 350 U. S. 523, 76 S. Ct. 608;
Galloway v. *United States*, 319 U. S. 372, 63 S. Ct. 1077;
Byrd v. *Blue Ridge Rural Electric Co-operative*, 356 U. S. 525, 78 S. Ct. 893;
Ward v. *Atlantic Coast Line R. R. Co., supra;*
Baker v. *Texas & Pacific Ry. Co., supra.*

In *Kennedy* v. *Pennsylvania Railroad Company*, 282 Fed. 2d 705, 710, 3 C. C. A.:

> "However, in the light of the foregoing the jury findings were not fully determinative of the question of indemnity. Therefore the judgment in favor of the Pennsylvania Railroad Company will be reversed and that cause remanded for a new trial."

In *Blue Ridge Rural Electric Co-operative Inc.* v. *Byrd*, 264 Fed. 2d 689, 693, 4 C. C. A.:

> "These questions are not susceptible of definite answer in the present state of the record, and hence we cannot say conclusively that there was no evidence of negligence on the part of the defendant's lineman."

In *Louisville & N. R. Co.* v. *Johnson*, 81 Fed. Rep. 679, at page 681, 7 C. C. A., the Court stated:

> "* * * It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. * * *"

Plaintiff was entitled to a fair trial in a fair tribunal where every effort should be made to prevent even the possibility of unfairness.

In re Murchison, 349 U. S. 133, 136;
Offutt v. *United States*, 348 U. S. 11;
Tumey v. *State of Ohio*, 273 U. S. 510, 532.

The three questions speak for themselves.

They were submitted for the purpose of confusing and entrapping the jury and by reason thereof were highly prejudicial and constituted error.

Blankenship v. *Ellerman's Wilson Line New York Inc.*, 4 C. C. A., 265 Fed. 2d 455;
Atchison Topeka and S. F. Ry. Co. v. *Hale*, 69 Pac. 612 (Kan.);
B. F. McLean Investment Company v. *City of Wichita*, 268 Pac. 2d 956 (Kans.);
Vukich v. *City of Detroit*, 28 N. W. 2d 894 (Mich.);
Greenwood v. *Inter Ocean Insurance Co.*, 89 S. E. 2d 455;
Reliance Engineers Co. v. *Flaherty*, 300 N. W. 603 (Minn.);

John M. Parker & Son v. *Godsey*, 115 S. W. 2d 276 (Ark.);

Pritchett v. *Highway Insurance Underwriters*, 304 S. W. 2d 585 (Tex.);

Neumann v. *Evans*, 272 Wis. 579;

Johnson v. *Firemans Fund Indemnity Co.*, 264 Wis. 358.

In *Atchison Topeka and S. F. Ry. Co.* v. *Hale*, *supra*:

> "A court should never submit special questions that are intended to or are liable to confuse or entrap it into making mistakes."

In *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 Fed. 2d 455, 4 C. C. A., the Court submitted a special verdict of four questions:

> 1. Did any unseaworthiness of the ship contribute to the accident?
>
> 2. If the answer to question 1 is answered "yes" was such unseaworthiness caused by any negligence on the part of the ship or any officer or employee of defendant?
>
> 3. Contributory negligence?
>
> 4. Was the accident of which the plaintiff complains the result of risks or hazards which he voluntarily assumed?

The jury brought in the answer "no" to the first question and did not answer any of the others, and upon such verdict judgment was entered in favor of defendant.

The Court of Appeals however held that the mere inclusion of the assumption of risk in the questions required a new trial.

> "The testimony on the question of seaworthiness was so conflicting that it would have supported a finding either way and the jury were told that in

> order to find in the plaintiff's favor on this matter, they must not only find unseaworthiness but also that it was the cause of the accident. At the same time the question of the assumption of risk was also submitted and the jury were told that it comes into play when a person knows that what he is doing constitutes a very definite hazard and yet voluntarily assumes it. *Keeping this instruction in mind, the jury might have concluded that the lighting in the hold was bad and yet answered the first question in the negative on the ground that the plaintiff knowingly assumed the risk and that this action on his part rather than the failure of the ship was the cause of the injury.*" (Italics ours.)

This rule of law is confirmed in *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U. S. 273, 279, 79 S. Ct. 1184, 1188:

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

The questions in and of themselves constituted a premeditated act on the part of the Trial Court to inform and advise the jury as to the legal effect of their answers to the questions, a course of conduct that is prohibited and condemned by established rules of law.

> *Thelorf* v. *Lipsey*, 237 Fed. 2d 190, 7 C. C. A.;
> *Cate* v. *Good Brothers*, 181 Fed. 2d 146, 3 C. C. A.;
> *Carpenter* v. *Baltimore & Ohio Ry. Co.*, 109 Fed. 2d 375, 6 C. C. A.

The questions evidence the opinion of the Trial Court that the plaintiff "stealthily got aboard the barge with a view to committing larceny" and apparently he had succeeded in part because he was not discovered until the captain went in there after he had completed some of his chores on the deck" (App. 22a).

These three questions in and of themselves presented such a prejudicial outline of this case that the judgment must be reversed.

First Question

The suggestion by counsel for plaintiff that only one question of fact be submitted, namely, whether the visit of the plaintiff on the barge was inimical to the legitimate interests of the barge, is the only submission that could have been made which would have prejudiced no one.

If plaintiff's presence was not inimical, such presence could have been justified by a finding by the jury either

(1) that plaintiff had been expressly invited on the barge by the captain, or

(2) that there had been the legal change of status contended for by plaintiff by the applicable decisions herein referred to.

Either finding would have been sufficient to justify a verdict in his favor as to status.

It was not necessary for plaintiff to prove an "express" invitation in the first instance.

But this is what the Trial Court erroneously insisted upon throughout the trial.

The legal distinction as to any "change of status" could not have been decided by the jury by any answer to any question.

Such distinction could not then and cannot now be determined because any inquiry would be in the alternative, a rule of procedure prohibited by this Court in *United New York and New Jersey Sandy Hook Pilots' Ass'n* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, where it is stated:

> "It follows from what has been said that a new trial will be required, for there is no way to know

> that the invalid claim of unseaworthiness was not the sole basis for the verdict."

By his own testimony the captain eliminated the legal effect of the answer of the jury to the first question.

The social visit that the captain recognized and admitted, nullified any possible improper entry.

The first question in and of itself presents an unfair prejudicial inquiry that might and could reasonably cause the jury to determine that the visit of the plaintiff on the barge was necessarily "inimical" because he was not invited on the barge.

"In the interest of fairness" (*Magenau* case, *supra*) the precise issues must be properly presented.

The fact that there was testimony in the record which would justify the conclusion of the jury that there had not been an express invitation does not and cannot defeat the claim of plaintiff that his change of status, admitted by the captain himself was sufficient to establish the right of plaintiff to recover herein under the rule of law established in the *Kermarec* case, *supra*.

This issue required a decision by the jury.

SECOND QUESTION

The question itself prejudicially presents the issue of the authority of the captain.

No shipowner can rely upon the defense that the plaintiff must prove the precise actual authority of any vessel, barge or otherwise.

His authority is proven by the very position that he holds. In *The Balsa*, 10 Fed. 2d 408, 409, 3 C. C. A.:

> "The Master is commander of the ship—lord of his little world. He is master in every sense of the word."

Apparent authority is the test, not actual authority.

Defendant is responsible for any acts of the captain which are within the apparent scope of his authority.

> *Lee* v. *Jenkins Bros.*, 268 Fed. 2d 357, 2 C. C. A.;
> *Farmer* v. *Arabian American Oil Company*, 277 Fed. 2d 46, 2 C. C. A.;
> 2 Corpus Juris, Sec. 1227;
> 2 American Jurisprudence 82.

The question itself limits the authority to the inquiry whether the captain had authority to invite the plaintiff on the barge

> "for a purpose other than one in the interests of its owners."

During the trial the Court permitted counsel for defendant to introduce proof as to the written instructions given to the captain and the regulations of the Coast Guard as bearing on the authority of the captain.

They were referred to in the charge and the jury was instructed that they could be considered by it in determining the authority of the captain (App. 13a).

Counsel objected to these instructions (App. 18a, 19a).

Counsel had already objected to the submission of questions 1 and 2 not only before argument but after the charge.

The objection to the submission of question 2 was most specific; as the Court below stated in its second footnote:

> "He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the Captain to invite him and not the actual inter-company limitations on the Captain's authority that would control."

This question 2 and the instructions mentioned forced upon the jury the conclusion that the captain had no authority to invite or permit the plaintiff to remain aboard the barge unless, as the question and the instructions state:

> "for a purpose other than in the interests of the owners."

This conclusion is contrary to the applicable decisions and wholly erroneous.

This Court said in *Ward v. Atlantic Coast Line R. Co.*, 80 S. Ct. 789, 792:

> "The instructions given in effect limited inquiry to the question whether the petitioner was aware that the railroad considered him not to be working for it but for some third party. But neither the railroad's communication of its concept of petitioner's status to petitioner, nor his acquiescence therein, if shown, is determinative of the issue. Cf. Cimorelli v. New York Central R. Co., 6 Cir. 148 Fed. 2d 575, 578. The parties characterization is but one factor to be considered among others, see Restatement, Agency 2d, Sec. 220(2)(i) and the issue is one for determination by the jury on the basis of all the relevant factors. Baker v. Texas & Pacific R. Co., supra."

To the same effect:

> *Baker v. Texas & Pacific R. Co., supra;*
> *Magenau v. Aetna Freight Lines Inc., supra.*

THIRD QUESTION

The third question was not an improper question and in and of itself would have determined the precise issue with reference to the "status" of the plaintiff on the barge at and immediately prior to the time of the accident.

"Inimical" was defined in the *Kermarec* case by the statement in the opinion:

> "The purpose of the visit was entirely personal: to pay a social call upon Yves and to give him a

package to be delivered to a mutual friend in France."

Webster's Dictionary defined "inimical":

> "1) Having the disposition or temper of an enemy; unfriendly; unfavorable, chiefly applied to PRIVATE, as HOSTILE is to PUBLIC, enmity."

When the jury requested clarification of the word, counsel for plaintiff stated:

> "They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

Plaintiff was entitled to that definition in the charge.

The Trial Court defined it as meaning "inconsistent with".

Its meaning the Court below refused to determine because it said it was unnecessary.

The three question verdict was prejudicial in form. It confused and entrapped the jury and prevented it from determining the ultimate status of the plaintiff.

The first question limited the inquiry solely to the initial invitation.

This precluded any inquiry as to the conceded "change of status" as a result of what transpired during the social visit of plaintiff and the captain at which time the captain admitted he gave milk to the plaintiff.

The second question eliminated any possible issue of "apparent authority" which was a real issue in the case. It further limited whatever authority the captain had by prohibiting him from doing anything that did not further the interests of the owner of the barge.

The third question forced the jury to answer it "yes" because the captain could not invite the plaintiff to come on the barge, could not permit him to remain on the barge

within the meaning of the *Kermarec* case for the alleged reason that the captain had no authority whatsoever because of the instructions given him by the owner and by the regulations of the Coast Guard unless the visit of the plaintiff was to further the legitimate interests of the owners of the barge.

The conclusion of the Court below that the three questions were not prejudicial to the rights of the plaintiff is contrary to the law and must be reversed.

The necessity of submitting a special verdict free from confusion and entrapment is analogous to the decisions requiring proper, concise instructions to a jury upon the precise issues.

United New York and New Jersey etc. v. *Halecki*, 358 U. S. 613, 79 S. Ct. 613;
Halecki v. *United New York and New Jersey etc.*, 282 Fed. 2d 137, 2 C. C. A.;
Magenau v. *Aetna Freight Lines*, 360 U. S. 273;
Ward v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
Conn v. *Young*, 267 Fed. 2d 725, 2 C. C. A.;
Smith v. *Texas Company*, 219 Fed. 2d 74, 2 C. C. A.;
Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 482, 486, 3 C. C. A.;
Texas & New Orleans R. Co. v. *Dairyland Trans. Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;
Turner v. *Kelly*, 262 Fed. 2d 207, 4 C. C. A.;
Louisville & N. R. Co. v. *Johnson*, 81 Fed. 679, 691, 7 C. C. A.;
Johnson v. *Erie R. Co.*, 236 Fed. 2d 352, 2 C. C. A.;
Molnar v. *Slattery Contracting Co. Inc.*, 8 A. D. 2d 95 (N. Y.);
Herbst v. *Balogh*, 7 A. D. 2d 530 (N. Y.).

In *Kendrick* v. *Piper Aircraft Corp.*, *supra*:

"But error there is and it cannot be held called harmless error if the members of the jury, perhaps

by legal fiction, listen to everything the judge tells them, understand it, remember it, and then apply it."

In *Texas & New Orleans R. Co.* v. *Dairyland Transp. Corp., supra:*

> "It would, however, be unrealistic for us to hold that, by not explaining the legal effect of an extra-hazardous crossing, the charge was rendered harmless. To the contrary, that omission was an added error which left free to determine such legal effect for itself."

In *Conn* v. *Young, supra*, the Second Circuit stated:

> "The instructions, however, are confusing, unduly complicated and heavily weighted in plaintiff's favor. In some instances where proper and necessary instructions are given in the form submitted by defendant they are inserted out of context and so enmeshed in irrelevant verbiage as not to be intelligible to the jury. The instructions were so erroneous in several respects and so prejudicial to defendant as to require a new trial."

In *Molhar* v. *Slattery Contracting Co, Inc., supra*,

> "The charge, while excellent in some respects, failed to clearly and adequately set forth the applicable principles of law. Where a charge is inadequate or of so confusing a character as to preclude fair consideration by the jury a judgment will be reversed and a new trial ordered."

In *Herbst* v. *Balogh, supra*:

> "When the charge is not clear and fails to adequately convey to the jury plaintiff's claim, a new trial is required in the interest of justice."

The issues were not properly submitted for the jury for determination necessitating the reversal of the judgment herein.

POINT V

The submission of the three question verdict after the argument and before the charge of the Court to the jury is contrary to Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 provides:

> "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury."

At the conclusion of the trial, the trial Court advised counsel that he would submit a special verdict of seven question covering the issues of liability and damages.

Relying upon this statement of the Court counsel for plaintiff presented his arguments to the jury. Counsel for defendant did likewise.

After the conclusion of the arguments and without any notice whatsoever the Court determined upon the three question verdict.

Rule 51 provides that counsel must be advised in advance of the guiding principles under which argument to the jury must be made.

In *Clegg* v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157 (5 C. C. A.):

> "It is required to enable counsel intelligently to prepare requested charges, determine all of the issues which must be submitted, and then to plan an effective argument whose objective is to translate persuasion into specific decisive action by the jury."

To the same effect:

Dallas Ry & Terminal Co. v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

In this case counsel were misled by the trial Court. They were told what the special questions were to be; they argued the case to the jury and after all arguments were completed they were confronted with the special verdict which the court insisted in submitting to the jury over the objections of counsel for plaintiff.

Such conduct prevents the fair, impartial and orderly conduct of a trial and must not be permitted.

Such erroneous conduct is fundamental, obvious and injuriously prejudicial to the plaintiff herein.

Gibson v. *Lockheed Aircraft Service Inc., supra; United States* v. *Atkinson, supra*, and cases already cited in brief.

For this error this judgment must be reversed.

POINT VI

There are questions involving the construction of Rules 49 and 51 of the Federal Rules of Civil Procedure upon which the Courts of Appeal have expressed differing views which should be resolved by this Court.

The proper construction of Rules 49 and 51 of the Federal Rules of Civil Procedure are necessarily involved in this case.

The various Courts of Appeal have expressed differing views on these issues.

Such conflicts of opinion should be resolved by this Court and a writ of certiorari granted herein for this reason.

Mitchell v. *Trawler Racer, Inc.*, 80 S. Ct. 926.

RULE 49

Rule 49 of the Federal Rules of Civil Procedure provides in part:

> ***"Special Verdicts.*** **The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."**

After completion of the evidence the trial Court advised counsel that he would submit a special verdict of seven questions.

After all arguments of counsel, the trial Court advised counsel it would submit the three questions which related to the issue of liability.

Counsel for plaintiff objected to the three questions but consented to one as to whether the visit of the plaintiff on the ship was inimical to the legitimate interests of the shipowner.

There was no attempt to submit a general verdict with special interrogatories as permitted by section b of Rule 49.

The Court below determined that questions 1 and 2 were not prejudicial and that counsel for plaintiff had waived the right to require the presentation of all issues by special interrogatories

The mere submission of the three questions was wholly contrary to the decision of this Court in *Miner v. Atlass*, 80 S. Ct. 1300.

(a) The proposed piecemeal verdict was properly excepted to and is contrary to the accepted practice of this Court and of other Circuit Courts.

The law is well settled that there can be no piecemeal submission of litigation.

> *Magenau* v. *Aetna Freight Lines Inc., supra;*
> *Ward* v. *Atlantic Coast Line R. Co. supra;*
> *Baker* v. *Texas & Pacific R. Co., supra;*
> *Hodges* v. *Easton, supra;*

Miller v. *American Bonding Company*, 257 U. S. 304, 308;

McKeon v. *Central Stamping Company*, 264 Fed. 385, 391, 3 C. C. A.;

Beacon Theatres Inc. v. *Westover*, 359 U. S. 500, 79 S. Ct. 948.

The submission of the three questions after argument was particularly prejudicial and contrary to the decisions of other Circuit Courts.

This precise issue has been presented and condemned in these cases.

Clegg v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157, 5 C. C. A.;

Dallas Ry. & Terminal Company v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

(b) The prejudicial attempt to entrap and confuse the jury has been condemned in other decisions.

Blankenship v. *Ellerman's Wilson Line New York*, 265 Fed. 2d 455, 4 C. C. A.;

Magenau v. *Aetna Freight Lines Inc.*, 360 U. S. 273, 279, 79 S. Ct. 1184.

See other decisions of state courts cited at page 27 of this petition.

The prejudicial attempt to confuse and entrap a jury by improper instructions has likewise been condemned.

There are many cases affirming this conclusion.

Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 283, 290, 3 C. C. A.;

Texas & New Orleans R. Co. v. *Dairyland Transport Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;

Louisville & N.R. Co. v. *Johnson*, 81 Fed. 679, 691, 7 C. C. A.;

and other cases cited at page 35 of this petition.

RULE 51

(a) The determination by the Court below that it would not consider the erroneous charge of the Trial Court because no proper exception was taken is contrary to the decisions of this Court and other Circuit Courts.

See:

Hormel v. *Helvering*, 312 U. S. 552, 556;
United States v. *Atkinson*, 297 U. S. 157, 160;
Dowell Inc. v. *Jowers*, 166 Fed. 2d 214; 5 C. C. A.;
McNello v. *John B. Kelly Inc.*, 283 Fed. 2d 96, 102, 3 C. C. A.;
Callwood v. *Callwood*, 233 Fed. 2d 784, 788, 3 C. C. A.;
Montgomery v. *Virginia Stage Lines Inc.*, 191 Fed. 2d 770, 774, U. S. Appeals D. C.;
Shokuwan Shimabukuro v. *Higeyoshi Nagayama*, 140 Fed. 2d 13, U. S. Appeals D. C.

Precise exception is not necessary as long as the Trial Court has been advised as to the contention of the litigant.

Many cases sustain this contention.

Broderick v. *Harvey*, 252 Fed. 2d 274, 1 C. C. A.;
Greyhound Corporation v. *Blakley*, 262 Fed. 2d 401, 9 C. C. A.;
Pierro v. *Carnegie-Illinois Steel Corp.*, 186 Fed. 2d 75, 3 C. C. A.;
Green v. *Reading Company*, 183 Fed. 2d 716, 3 C. C. A.;
American Alliance Insurance Company v. *Keleket X-Ray Corp.*, 248 Fed. 2d 920, 6 C. C. A.;
Elgin Corp. v. *Atlas Bldg. Products Inc.*, 251 Fed. 2d 7, 10 C. C. A., cert. denied 78 S. Ct. 1371.

One exception is sufficient.

Moreau v. *Pennsylvania R.R. Co.*, 166 Fed. 2d 543, 3 C. C. A.;
Union Pacific R. Co. v. *Owens*, 142 Fed. 2d 145, 9 C. C. A.;
U. S. v. *Rayno*, 136 Fed. 2d 376, 1 C. C. A. cert. den. 320 U. S. 776.

(b) The determination of the Court below that plaintiff could not raise the conceded and undenied exception taken by plaintiff to the instruction given by Court after the jury had sent the written request for clarification of the term "inimical" as shown by the record is contrary to all prior decisions.

See Point III of this Petition and cases there cited including decisions of this Court and various Circuit Courts.

(c) The determination of the Court below that it was not necessary to pass upon the liability created by the "change of status" is contrary to the applicable law.

See:

Ward v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
Magenau v. *Aetna Freight Lines Inc.*, *supra*;
Baker v. *Texas & Pacific Ry. Co.*, *supra*;
Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 482, 486, 3 C. C. A.;
Texas and New Orleans R. Co. v. *Dairyland Trans. Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;

and other cases cited in Point IV of this petition.

(d) The determination of the Court below that it was not necessary to tell counsel before argument as to the exact questions which were to be submitted in the ultimate special verdict is contrary to applicable law.

See:

Clegg v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157, 5 C. C. A.;
Dallas Ry. & Terminal Co. v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

These differing views of this Court and other Circuit Courts as to the construction to be placed upon Rules 49 and 51 of the Federal Rules of Civil Procedure necessitate their review by this Court.

Mitchell v. *Trawler Racer Inc.*, 80 S. Ct. 926.

POINT VII

Petitioner has been denied the trial by jury guaranteed to him by the Seventh Amendment of the Constitution of the United States.

The decisions of this Court have enforced the rights of all parties guaranteed by the Seventh Amendment.

It is elementary that a reversal of a judgment must be granted, where, as here there has been an obvious miscarriage of justice. *Gibson* v. *Lockheed Aircraft Service*, *supra*.

Throughout the trial counsel for plaintiff based his right of recovery herein under the rules of law enunciated by this Court in *Kermarec* v. *Compagnie General Transatlantique*, *supra*.

It was his contention in the first instance, all throughout the trial and now, that the same legal status given Kermarec in his case should be given this plaintiff whether it was his at the time he initially boarded the barge or whether his entry, which might have been unjustifiable, had been changed to that of an invited guest by reason of what had occurred on the boat.

In any event plaintiff was and still is entitled to a determination of his rights.

It was denied by the Trial Court.

Such determination was evaded by the Court below on grounds that are untenable and wholly erroneous.

Plaintiff's rights herein cannot be defeated

1. by any finding of a jury that he was not invited on the barge;

2. by any erroneous finding of the jury that the Captain had and could have no authority other than that given him by its owners;

3. by any erroneous finding that his visit must be "inimical" because it was "inconsistent with" the interests of its owners.

Plaintiff has been and is entitled to a fair and impartial determination by a jury as to whether

1. there was a change in his legal status after he came aboard the barge;

2. he was entitled to the protection of the same legal rights given Kermarec by this Court in his case; and

3. his visit on the barge was in fact and in law "inimical" to the legitimate interests of the owners of the barge.

From the beginning of the trial to the very end the Trial Court was prejudiced against him. He was considered as a legal outcast entitled to no legal protection from any source.

It was the opinion of the Court as he told counsel at the trial that the plaintiff

> "stealthily got aboard this barge with a view to committing larceny in the cabin of the captain and apparently he succeeded in part because he was not discovered until the captain of the barge went in there after he completed some of his chores on the deck." (App. 22a)

This attitude of the Trial Court is reflected throughout the record of the trial.

This attitude is confirmed by the indisputable fact that plaintiff was never permitted to have his contentions submitted for the determination of the jury.

This is confirmed by the obvious continuance of such prejudicial mistreatment from the beginning to the end of the trial.

The Court below has erroneously determined that plaintiff had waived his right to a fair trial, to a full, fair and unprejudiced presentation of the facts before a jury.

The record speaks for itself.

The cases cited confirm the contentions of counsel herein.

The protection of the Seventh Amendment should be granted to the plaintiff by the reversal of the judgment and an opportunity to have his rights determined.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

JACOB RASSNER and
LOUIS J. OPAL,
Attorneys for Petitioner.

THOMAS F. FRAWLEY,
BENJAMIN SCHWARTZ,
on the Brief.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 13—October Term, 1960.

(Argued September 28, 1960

Decided November 21, 1960.)

Docket No. 26145

JOACHIM RIBEIRO,

Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY, a New Jersey Corporation, and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Defendants-Appellee,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Plaintiff-Appellee,

v.

ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Third-Party Defendant-Appellee.

—o—

Before:

LUMBARD, *Chief Judge*,
TUTTLE* and FRIENDLY, *Circuit Judges*.

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*Of the Fifth Circuit, sitting by designation.

Appeal by plaintiff in admiralty personal injury suit from judgment following jury's answers to special interrogatories in favor of defendant. Judgment affirmed.

LOUIS J. OPAL (Jacob Rassner, Thomas F. Frawley, Benjamin Schwartz, on the brief), *for Plaintiff-Appellant.*

HAMPTON & MAHONEY, 76 William Street, New York 38, N. Y., *for United Fruit Co., Defendant-Appellee.*

KIRLIN CAMPBELL & KEATING (Walter X. Connor, James P. O'Neill, on the brief), 120 Broadway, New York 5, N. Y., *for Esso Standard Oil Co., Defendant-Appellee.*

TUTTLE, *Circuit Judge*:

Appellant appeals from a judgment in favor of the defendant, Esso Standard Oil Company, based on adverse answers by the jury to special interrogatories in this personal injury admiralty case. The jury, in answering the questions as it did, was authorized to believe the following facts:

The plaintiff was a night watchman on the S.S. PARISMINIA; defendant's barge No. 23 was tied up alongside this vessel to bunker it. Its crew consisted of two men designated by Esso as "captain" and "mate." The bargemen, in order to prepare for the fueling operation, placed a ladder on the deck of the barge leading to the deck of the ship. The bargemen prepared the vessel for the pumping of the fuel and returned to the barge.

Plaintiff had no duties on board the barge. Upon his return to the barge the captain entered a housing at the

stern which he used as his office and which also contained a small kitchen. When he entered he found the plaintiff inside drinking milk from a container which he had taken from the barge's refrigerator. When the captain asked the plaintiff what he was doing on the barge the latter replied that he wanted some coffee. The captain replied that he could have a cup of coffee, but plaintiff said he wanted a package of coffee. The captain replied that he had no coffee to give him. However, he permitted the plaintiff to finish the milk, after which he left. Shortly thereafter a noise was heard on deck and the plaintiff was found lying on the deck of the barge near the ladder. He was assisted by the bargeman to a chair, and, after about five minutes, ascended the ladder to his own ship without assistance. Plaintiff's claim is that the ladder had fallen with him. The captain and mate testified that the ladder did not fall.

Plaintiff's principal ground of reversal is his contention that the trial court erred in submitting only three special interrogatories to the jury. The questions put to the jury, and answered by it, were:

> "Did the captain of the Esso Barge 23 invite the plaintiff aboard the barge?
>
> The answer is 'No.'
>
> Did the captain have authority to invite the plaintiff aboard the barge for a purpose other than one in furtherance of the interests of the owner?
>
> The answer is 'No.'
>
> Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?
>
> The answer is 'Yes.'"

Plaintiff avers that Rule 49, Federal Rules of Civil Procedure, provides that special interrogatories "can only accompany a general verdict," citing the following excerpt from Rule 49(b):

> "The court may submit to the jury together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict."

Being met with appellee's citation of Section 49(a), "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact," appellant, in his reply brief, challenges the correctness of the trial judge's application of this rule by asserting that the three questions did not present "each issue of fact." The defendant counters that the plaintiff "consented that the jury first be asked to determine plaintiff's status on the barge" and then points to the further provision of Section 49(a), which provides:

> "If in so doing [submission of written questions] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."

Defendant points to the fact that, although plaintiff's counsel did object to certin parts of the charge, he did not request the submission of additional fact issues to the jury. There can be no doubt that a party can waive his right to require the presentation of all issues by special interrogatory. See *Merrill* v. *Beaute Vues Corporation*, 10 Cir., 235 F. 2d 893.

We think it appropriate here to comment on the very substantial failure by both parties to support several of their contentions, especially as relates to waiver of the submission on special interrogatories, by incorporating in

their appendices so much of the trial proceedings as was necessary to support their respective assertions. The appellant did not include in his appendix any of the discussion between court and counsel touching on the submission of the question of liability separately from the issue of damages, and on the submission of special questions without a general verdict. The appellee not only failed to furnish the court with this part of the minutes, *but it failed to file any appendix whatever.* As to such a failure to comply with the rules of this court we have recently said:

> "Rule 15(b), adopted in an effort to save parties the expense of printing immaterial parts of long records, demands a good faith effort by counsel to reproduce those parts that are material; and the court is always willing to entertain applications under Rule 15(a) to present even these in typewritten form where printing would be burdensome." *United States* v. *Lefkowitz, et al.*, 2 Cir.,—F. 2d—.

The failure of the parties to file appendices containing all of the transcript necessary to support the contentions of their proponent, and particularly the complete failure of appellee to furnish any appendix whatever, has made it necessary for the Court to comb through the entire stenographic transcript in order to resolve the conflicting statements in the briefs.

The inspection we have made clearly demonstrates that appellant did not object to dividing the jury issue into two parts, nor did he object to dividing the issue of liability into two parts: (1) the status of the plaintiff on board, and (2) the question of negligence if the answer to the status question did not resolve the case. The trial court made it clear before giving his charge to the jury that he would follow this procedure, and counsel acquiesced, as he did to the submission of the special interrogatories

without a general verdict.[1] Furthermore, after the charge was given to the jury, appellant made no objection to the form of the submission.

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[1] After the trial court announced his intention of submitting the question of liability first, and then submitting the issue of damages only if liability was established, the following colloquy took place:

"Gentlemen, do you understand what the questions are that we are going to put to them

Mr. Rassner: I do, your Honor.

The Court: it won't be necessarily in that language, but that is going to be the substance of it.

Mr. Rassner: May I make a comment as to that, your Honor.

The Court: Yes, sir.

Mr. Rassner: In the main I feel that your Honor's thoughts should facilitate matters. However, as a matter of protecting my client's rights I would like to express one objection. I feel that the question of whether or not the plaintiff was aboard that vessel lawfully, rightfully is a matter of law and not a matter of fact, and therefore I object to so much—I consent to everything else but object to so much—

* * *

Mr. Rassner: I object to the submission of whether or not the plaintiff was lawfully or properly aboard the vessel to the jury on two grounds: first, that I believe it was error for the Court to permit any evidence as to the rules and regulations of the company as not binding on the plaintiff and in no wise lessening the authority of the master to invite or permit the plaintiff aboard the vessel, and I use the words 'invite or permit' advisedly; secondly, that whether or not the plaintiff was there with the original express invitation of the master or with his consent is immaterial so long as he was there for purposes not inimical to the interests of the owners of the barge 23.

With that one reservation—

* * *

Mr. Rassner: For the record, I would like to make my position clear.

The Court: I don't know what it means, 'for the record.' In other words, you don't mean it seriously?

Mr. Rassner: No. I object to a question being submitted to the jury which in any wise gives them the duty or right to pass upon whether or not the plaintiff was aboard the vessel rightfully or wrongfully other than in a manner inimical to the interests of the barge 23."

On the other hand, it is equally clear that plaintiff did not waive his objections to the submission of the first two questions as not being relevant.[2] He expressly, however, agreed to the submission of the third question, subject to his contention that the jury should be instructed to answer that question in his favor.

Plaintiff adhered to the position that it was unimportant, in an action brought under admiralty rules, whether the plaintiff had been invited on the barge or whether, if so invited, the master was exceeding his authority, because he insisted, and here urges, that the recent Supreme Court decision of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, makes these questions irrelevant. The Court stated the question there to be:

> "The decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law."

It then answered the question by saying:

> "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. The Lottawanna, 21 Wall. 558, at 575. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea.[9] We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his

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[2] Plaintiff objected to the submission of the first question on the ground that it was immaterial whether he was an invitee or a licensee or even a trespasser. The only test was whether he was on board for purposes "inimical to the ship's interest." He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the captain to invite him and not the actual intercompany limitations on the captain's authority that would control.

legitimate interests the duty of exercising reasonable care under the circumstances of each case.[10] * * * *" (Footnotes in the opinion not here reproduced.) 358 U. S. 625, 632.[3]

We think we need not determine whether the submission of special interrogatory No. 1 actually presented a necessary factual issue as contemplated under Rule 49(b), *supra*. The plaintiff's status as an invitee or as a licensee on the barge may be a "circumstance" within the meaning of the Supreme Court's opinion quoted above. If so, it may be argued that it was necessary for the jury to resolve this issue before it could determine what would be reasonable care in such circumstances. However, since none of the three questions was in the alternative and they were not mutually dependent, and since the third question, agreed to be proper, presented the critical issue, we conclude that the submission of the first two questions, even if they did not present necessary issues, did not prejudice appellant. The jury expressly found, in answer to question No. 3, that he was "aboard the barge for a purpose inimical to the legitimate interest of her owner." This finding precludes a recovery on the ground of negligence. There was no basis for a finding that this defendant had violated any duty which he owed to this plaintiff as a trespasser. See 2 Harper and James, The Law of Torts, § 27.6, pp. 1461-67.

There is, of course, a further reason why the submission of the second question could not possibly harm the plaintiff. The jury expressly found that the captain did not invite the plaintiff. It, therefore, is immaterial that the jury was also asked to find whether the captain had actual authority to do so.

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[3] The term "all who are on board" was not used by the Supreme Court to include those as to whom the law gives extra protection, such as seamen and others aboard "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99. See footnote 9 in *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*.

In light of the consent by the plaintiff that this type of verdict might be asked, and in light of the fact that the first two questions did not complicate or bear in any way on the ability of the jury to answer the third one, we find that no prejudicial error resulted in the presenting of the three stated questions to the jury.

Plaintiff complains also about the court's admitting into evidence the written rules of the defendant touching upon the authority of the captain to invite visitors aboard the barge, and the admission of a written report of the mate. Since the jury found that the plaintiff was on the barge for purposes inimical to the interests of the ship, it is unimportant whether the captain was authorized under his company rule to invite him aboard. The admission of the rules could, therefore, not be prejudicial to the plaintiff. The written report of the mate was admissible under the principle recognized by this Court in *Gelbin* v. *New York, New Haven & Hartford R.R. Co.*, 2 Cir., 62 F. 2d 500. That case quoted from and approved the following statement from *DiCarlo* v. *United States*, 2 Cir., 6 F. 2d 364, 366:

> "It is well settled that, when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross-examined."

Finally, the plaintiff complains here that the court incorrectly charged the meaning of the word "inimical." After the jury had considered the case for some time they sent in a request for interpretation of the words "for purpose" and the word "inimical" as used in the third question. The question asked by the jury was, "In question 3 please clarify the use of the word 'inimical' and the phrase 'for purpose.'"

The court discussed the matter with counsel and plaintiff's counsel said: "May I respectfully ask the court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it? The meaning is hostile or harmful and nothing more." Previously, in the original charge, the court had said:

> "If you find the plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent, you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

This instruction was not objected to by the plaintiff.

In answer to its request for clarification the court told the jury:

> "It is very significant that your request is not for dictionary definitions of those words, but to clarify the use of those words. You know, a word used in one context may have one meaning and the same word used in a different context may have an entirely different meaning. As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with,' and the phrase 'for purpose' speaks for itself."

We think that the failure of the plaintiff to object to the instruction originally given and which the jury was still permitted to accept as correct even after the charge defining inimical as "inconsistent with," prevents the recharge from being error if in fact the court defined inimical too favorably for defendant, which we do not decide.

The judgment is AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of November, one thousand nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

" ELBERT P. TUTTLE,
" HENRY J. FRIENDLY,
Circuit Judges.

JOACHIM RIBEIRO,
Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, a New Jersey Corporation and ESSO STANDARD OIL COMPANY, a Delaware Corporation,
Defendants-Appellees,

UNITED FRUIT COMPANY, a New Jersey Corporation,
Third-Party Plaintiff,

—v.—

ESSO STANDARD OIL COMPANY, a Delaware Corporation,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 752.

JOACHIM RIBEIRO,

Petitioner,

against

UNITED FRUIT COMPANY, a New Jersey Corporation, Defendant and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Respondent,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Defendant.

BRIEF OF RESPONDENT ESSO STANDARD OIL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI AND ADDENDUM.

WALTER X. CONNOR,
Attorney for Respondent Esso Standard Oil Company,
120 Broadway,
New York 5, N. Y.

JAMES P. O'NEILL,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 752

JOACHIM RIBEIRO,

Petitioner,

against

UNITED FRUIT COMPANY, a New Jersey Corporation, Defendant and Esso STANDARD OIL COMPANY, a Delaware Corporation,

Respondent,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Defendant.

BRIEF OF RESPONDENT ESSO STANDARD OIL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

Plaintiff below petitions for a review of an order of the United States Court of Appeals for the Second Circuit (November 21, 1960) affirming a judgment of dismissal filed December 15, 1959, entered on a jury verdict on special findings after a trial before District Judge Alexander Bicks.

Petitioner was a watchman employed by Piership Protective Association and assigned to the SS. *Parisminia* which was owned by United Fruit Company. Petitioner

claimed injuries suffered while returning to the SS. *Parisminia* from the Esso Barge #23 which was moored alongside the SS. *Parisminia*. Petitioner had no business on the barge and, as the jury found, was a trespasser thereon. (Pet.'s App. 49) The Esso Barge #23, which was to bunker the SS. *Parisminia*, was owned and operated by respondent, Esso Standard Oil Company, hereafter referred to as Esso or respondent.

Petitioner discontinued his suit against defendant United Fruit Company at the conclusion of his case in the trial court. Therefore, United Fruit Company, although named as a respondent, is not concerned with this petition.

The opinion of the Court of Appeals, reported at 284 F. 2d 317, after considering every point raised by petitioner below, unanimously affirmed the judgment.

In the Court of Appeals, petitioner alleged errors as to matters to which he had consented on the trial and also as to charges to the jury to which he did not take appropriate exception. He is barred from now asserting them. (F. R. C. P. 51)

The jury found that (1) petitioner had not been invited on the barge; (2) the bargee was without authority to invite him; (3) petitioner boarded the barge for purposes inimical to the legitimate interests of respondent. (Pet.'s App. 49) Thus what the petitioner really seeks is to have this Court review issues of fact already determined by a jury.

Throughout petitioner's brief, statements are made with respect to matters which he says took place on the trial but nowhere does he document them. He has not even furnished a transcript of the record which was before the Court of Appeals.

The Court of Appeals justifiably criticized counsel for both parties for failing to present adequate appendices to

their respective briefs. In order that this Court has before it record references to the relevant portions of the transcript of the record, respondent has annexed to its brief an Addendum in which the Court will find adequate support for the fact statements made by respondent.

This Court has the right to infer from petitioner's failure to document his charges of error, that the record does not support the charges and this Court can justifiably ignore them. No attempt will be made in respondent's brief to indicate the petitioner's erroneous statements *seriatim* because it would unduly extend respondent's brief. It is thought sufficient to deal with them in the counter statement of facts and the argument where controversial facts will be noted.

Character of the Litigation.

This is a non-statutory action for negligence based on diversity of citizenship against the barge owner, Esso Standard Oil Company. The action is for damages for alleged personal injuries sustained by petitioner, a watchman, when he allegedly fell while ascending a ladder from respondent's barge to the SS. *Parisminia*, which petitioner had left a short time before in violation of his watchman's duties.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court on the grounds that (1) the rulings of the Trial Court and the Court below were substantially prejudicial to petitioner's rights and (2) there is a conflict of opinion between various Courts of Appeal as to the construction and application of Rules 49 and 51 of the Federal Rules of Civil Procedure. The alleged conflict is not illustrated in petitioner's brief.

There is no conflict of opinion among the Courts of Appeal as to the meaning and construction of either rule 49 or 51 of the Federal Rules of Civil Procedure. The review now sought actually concerns only issues of fact of which the jury was the sole judge. There were not any errors of law.

Counter Statement of the Facts.

Petitioner, by day, was employed as a maintenance man by the Transit Authority of the City of New York. At night, he worked for Piership Protective Association as a watchman. The latter assigned him to duty on the SS. *Parisminia* which was docked at Pier 7 North River. Here he was under the jurisdiction of the vessel's night mate Edward McCafferty. (13a)*

Petitioner testified that it was his duty to look after the safety of the SS. *Parisminia* both with respect to fire and other hazards and to exclude from the ship any persons not authorized to be on board (12a, 13a). Therefore, he had to guard the gangway which led from the dock to the deck of the SS. *Parisminia*. Petitioner admitted that he was not permitted to leave the SS. *Parisminia* unless he had the specific permission of the mate McCafferty, which he did not procure. (13a) He admitted also that his leaving the ship without obtaining this permission was in violation of his duties and the regulations of the Waterfront Commission, for which he could lose his watchman's license. (14a)

Although petitioner in his pleadings alleged that he was attending to his lawful duties while on the Esso Barge, he offered no proof of this allegation on the trial. To the

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* References, unless otherwise specified, are to the respondent's Addendum to its brief.

contrary, he admitted that he had no business or duty on the barge and that he only boarded it on the "invitation" of the barge captain to have a cup of coffee. (10a) The barge captain denied the "invitation" and denied also authority to extend it. (5a) The testimony showed that Esso had issued written instructions which forbade invitations to strangers (5a, 9a) and a large sign located in the midships section of the barge contained the words "No visitors". (5a, 9a) The alleged "invitation" took place in daylight. The sign could be plainly seen from the SS. *Parisminia*. Thus there could not be any apparent authority on the part of the barge captain to extend the "invitation" to petitioner.

Petitioner worked for the Transit Authority from 8 A. M. to 4 P. M. (11a) On May 9 after finishing his work on the subway, he went to his home in Hastings, New York. After spending a few hours at home, he returned to New York City to take up his duties as watchman on the SS. *Parisminia*. (11a) His tour of duty was from 11 P. M. to 7 A. M. (12a)

On May 10 at about 6:30 o'clock in the morning, the Esso Barge #23 was towed alongside the SS. *Parisminia* to bunker it. The barge was not self-propelled but was moved from place to place in the harbor by tugs (Pet.'s App. in the Court of Appeals 9a, 10a). Its crew consisted of 2 men designated by Esso as "captain" and "mate". No officer's license was required. (8a) The "captain", Tollefsen held an A. B. seaman's certificate. (8a) Servilla, who held an ordinary seaman's certificate, was the "mate." (16a) Both men had been employed on Esso barges for a number of years and were experienced workers.

After the barge was placed alongside the vessel, mooring lines were attached to the deck of the SS. *Parisminia*

and made fast on the barge. This was done by putting the loop of the hawsers over bitts on the deck of the ship and then securing them on the barge itself. Thus the mooring lines could be operated only from the barge. (7a)

Thereafter, the bargemen erected an aluminum ladder which had feet at the bottom attached to the side rails of the ladder. The undersurfaces of the feet were made of rubber. Servilla then ascended the ladder and pulled two lashings from the top of the ladder through the rail on the ship and back to the foot of the ladder where Tollefsen made the lashings fast. This permitted the operating of the lashings only from the deck of the barge. (1a, 3a, 4a)

The bargemen then performed additional chores about the deck of the barge in preparation for the pumping of the bunkers. When the chores were completed, the "captain" entered a housing on the stern of the barge which he used as his office, and which also contained a small kitchen. When he entered, he found the petitioner inside drinking milk from a container which petitioner had taken from the barge's refrigerator. (2a) Tollefsen asked the petitioner what he was doing on the barge. The petitioner replied that he wanted some dry coffee beans. (2a, 3a) The captain replied that he had no coffee to give him. However, he allowed petitioner to finish the milk. When petitioner had finished the milk, he left. (3a)

A short time later a noise was heard on deck, and on investigation it was found that petitioner was lying on the deck of the barge near the ladder. (3a) He was attempting to arise from the deck when he was found. He was assisted by the bargeman to a chair. He appeared to have suffered only minor injuries which were satisfactorily treated with two band-aids. (17a, 4a) Petitioner remained on the barge for about 5 minutes and then ascended the ladder without assistance. (17a)

Petitioner contended that the ladder had fallen with him but the bargees testified that the ladder was in the same position as when first erected.

Petitioner was required to submit his time sheet to the mate on the SS. *Parisminia* at quitting time for certification by the mate. Petitioner did so but he did not report having had an accident on the barge. (10a, 14a) He left the SS. *Parisminia* about 7 o'clock in the morning and went directly to his job with the Transit Authority. (14a, 15a) He worked all day and returned that evening to his home in Hastings, where he sought treatment from a Doctor Fabiani. (15a)

Doctor Fabiani prepared a medical report for petitioner's employer (Piership Protective Association) in which he repeated petitioner's description of the cause of his injuries as follows:

> "9. State in patient's own words how the accident occurred:
>
> "While performing deck-patrol duties aboard ship *Parisminia*, scow captain threw me his line at stern and then to go to bow to help fasten ship; in so doing I slipped on either banana skins or grease and fell down hatch to deck below, striking ladder on way down. I was unconscious for 10 minutes. I was given first aid by scow capt. and sent home" (Esso Ex. J.).

The Questions Involved.

The threshold question for decision by the jury was what was petitioner's status on the barge. If he were not lawfully on the barge, irrespective of whether his presence was inimical to the legitimate interests of the owners, he was, as the jury found, a trespasser. Respondent had no

duty except to refrain from willful injury. No claim is made by petitioner that his alleged injuries were due to any willful act on the part of respondent or its agents.

Petitioner's erroneous position is that he had an absolute right, with or without invitation, to board the Esso Barge #23, and that unless he was promptly ejected, his 5 minute stay on the barge crystallized into a right to remain there resulting in a duty on the part of the respondent to avoid negligent injury to him.

With the consent of both parties, questions as to petitioner's status were submitted to the jury on special issues and the jury found in substance that petitioner was a trespasser who boarded the barge for purposes inimical to the legitimate interests of Esso. (Pet.'s App. 49)

Throughout his brief, petitioner charges that he was deprived of a fair trial; the trial judge usurped the function of the jury and, generally, that the trial was "replete with error." A similar charge was made orally (but not in petitioner's briefs) in the Court of Appeals. There was no documentation of the charges, as there is none in the petitioner's present brief. It is not for respondent to argue what action should be taken with respect to the unjustified attack on the integrity of the Trial Judge other than to respectfully suggest that it be ignored for want of truthfulness and support.

POINT I.

THE PETITION IS WITHOUT MERIT. THERE WAS NO ERROR BELOW. THE JURY'S FINDINGS WERE AMPLY SUPPORTED BY THE EVIDENCE.

All the cases cited in Point I of petitioner's brief substantiate respondent's position that since there was no error in the Trial Court and the Court below, the judgments of both courts are not subject to review by this Court.

In *Gibson* v. *Lockheed Aircraft Service*, 350 U. S. 356, this Court exercised its supervisory powers over the lower Federal Courts when it reversed a judgment of the Court of Appeals and reinstated the judgment of the District Court. This action was necessary because there was no error in the Trial Court's instructions and, therefore, the Court of Appeals should not have reversed the District Court's judgment entered on the jury verdict.

In *United States* v. *Atkinson*, 297 U. S. 157, this Court held that, in the absence of exceptional circumstances, error in a jury trial which was not brought to the attention of the Trial Court by proper exception or request to charge, will not be considered on appeal. This is precisely what the Court below found in regard to petitioner's alleged exceptions to the Trial Court's instructions.

It has always been regarded as improvident to grant a writ of certiorari where the only issues raised are those of fact and not of law. The findings of a jury are to be looked upon with the greatest possible weight by a court of review. As was stated by Mr. Justice Stone, speaking for the Court, in *United States* v. *Atkinson* (*supra*) at page 159:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the

trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver* v. *Taylor*, 93 U. S. 46; *Allis* v. *United States*, 155 U. S. 117, 122, 123; *United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348; *Pennsylvania R. Co.* v. *Minds*, 250 U. S. 368, 375; *Burns* v. *United States*, 274 U. S. 328, 336; (see *Shannon* v. *Shaffer Oil & Refining Co.*, 51 F. (2d) 878, 880)."

POINT II.

THE TRIAL COURT DID NOT ERR IN ITS SUBMISSION OF THREE QUESTIONS FOR DETERMINATION BY THE JURY IN THE FORM OF A SPECIAL VERDICT.

In the first place, petitioner's counsel consented that the jury first be asked to determine petitioner's status on the barge (Pet.'s App. in the Court of Appeals, 8a, 9a).

The Trial Court said in its charge to the jury:

> "Since you probably have not had experience with special verdicts the Court wants to take this opportunity to emphasize—I am repeating myself here, but I want for emphasis to make sure that you understand—that the submitting of a case for this type of verdict and not a general verdict is not to be construed by you as having any significance whatever. It is just a change in a procedural step which has no bearing at all upon the merits or demerits of this case. The purpose is merely as I indicated to you before we recessed yesterday, to facilitate your deliberations. The Court may require a special verdict. *Both counsel in this case have expressed approval of the program adopted by the court.*" (emphasis supplied)

Rule 49(a) F. R. C. P.[1] provides in part:

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."

The words "each issue of fact" are understood to mean not every issue of fact but ultimate issues of fact.

> "... The second provision of Rule 49(a) calls for 'a written finding upon each issue of fact.' This language is similar to the language used in the statutes of a number of states, particularly of Wisconsin and Texas, where its interpretation has occasioned considerable difficulty. Obviously, the simplest cases may involve many issues of fact; and, if an individual finding is required on each one, the special verdict becomes unwieldy. The courts have, therefore, sought to limit the fact issues submitted to 'ultimate fact issues' in contradistinction to 'evidentiary fact issues.'" Lipscomb, Special Verdicts Under the Federal Rules, 25 Wash. U. L. Q. 185, 189 (1940).

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[1] The text of Rule 49(a) of the F. R. C. P. is as follows: Special Verdicts

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Rule 49(b) provides in part:

> "The court may submit to the jury, together with appropriate forms for a general verdict written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict * * *".

It is left to the trial court's discretion to use either provision and it is free to use neither if the issues in the case are not complex. *Clegg* v. *Hardware Mut. Cas. Co.* 264 F. 2d 152 (C. A. 5th 1959) *Employers Mut. Casualty Co.* v. *Johnson* 201 F. 2d 153, (C. A. 5th 1953).

In the case at bar the Trial Court properly exercised its discretion by applying the provisions of Rule 49 (a) in placing the ultimate issues of fact before the jury. This procedure was more than justified in the light of the complexity of the issues, the length of the trial and the conflicting medical testimony adduced. Moreover, petitioner's counsel consented to the procedure (Pet.'s App. in the Court of Appeals 9a). As the court commented in its charge:

> "* * * the Court felt that there had been so much testimony on the issue of damages and interspersed testimony on the issue of liability that the Court as a matter of discretion concluded that it would aid you in your deliberations if we first disposed of first things" (Pet.'s App. in the Court of Appeals 8a).

The trial lasted from November 23 through December 4 during which 17 witnesses testified. Among these were 4 doctors and a psychologist. Four depositions were read.

The court in its charge went on to caution the jury as follows (Pet.'s App. in the Court of Appeals 8a):

> "You know, it is like 'first things come first'. You don't discuss damages until you find liability.

> But the fact that it is being submitted to you in this way has no significance and you are not to treat it any differently than if it were submitted to you all in one or for a general verdict."

Petitioner despite his consent on the trial, now argues that the procedure followed in the Trial Court deprived him of his right to trial by jury. He may not now voice this objection (F. R. C. P. 51).

As was recently stated in *O'Donnell* v. *Watson Bros. Transportation Co.*, 183 F. Supp. 577 (D. C. N. D. Ill. 1960) page 585:

> "... The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee. Gasoline Products Co. *v.* Champlin Refining Co. 1931, 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; Devine *v.* Patteson, 6 Civ., 1957, 242 F. 2d 828, 832-833, Certiorari denied 355 U. S. 821, 78 S. Ct. 27, 2 L. Ed. 2d 36; Washington Gas Light Co. *v.* Connolly, 1954, 94 U. S. App. D. C. 156, 214 F. 2d 254, 256-258; May Department Stores Co. *v.* Bell, 8 Cir., 1932, 61 F. 2d 830, 842-843; Simmons *v.* Fish, 210 Mass. 563, 568, 97 N. E. 102, 104."

Firstly, petitioner agreed to this practice during trial. Now, after the adverse result, he belatedly questions its validity on appeal. Secondly, petitioner waived his right to trial by jury on those issues of fact which he failed to demand be submitted to the jury before it retired. Rule 49 (a); *Merrill* v. *Beaute Vues Corporation*, 235 F. 2d 893, (10 Cir., 1956) *Clegg* v. *Hardware Mut. Cas. Co.* (*supra*). Thirdly, Rule 49 (a) has so remedied the deplorable circumstances surrounding special verdicts at common law that today juries are not burdened with the consideration of unwieldy evidentiary issues of fact but are permitted to

determine the ultimate issues of fact upon which a proper judgment may rest. Driver, "A More Extended Use of the Special Verdict", 9 F. R. D. 495; *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54, (CA 2-1948).

Trial by jury is a right subject to reasonable limitation as are all rights guaranteed by the Constitution. Rule 49 (a) is such a reasonable limitation:

> "The command of the Seventh Amendment 'that the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. Walker *v.* New Mexico & Southern Pacific R. R. Co., 165 U. S. 593, 596. . . . It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex Parte Peterson* 253 U. S. 300, 309, 310.
>
> See also, Galloway *v.* United States, 319 U. S. 372, 390 (1943); Byrne *v.* Mafezak, 254 F. 2d 525, 529 (3 Cir., 1958), cert denied 358 U. S. 816.

The constitutionality of the special verdict procedure has been settled. *Carr* v. *Beverly Hills Corporation*, 237 F. 2d 323, 325, C. A. 9th (reversed on other grounds, 354 U. S. 917—rehearing denied 355 U. S. 852); *O'Donnell* v. *Watson Brothers Transportation Company*, 183 F. Supp. 577 at page 586, where the court said:

"The authorities universally hold that the District Courts are empowered to order a separate jury trial on the issue of liability as a prerequisite to holding a jury trial on the issue of damages. See United States *v.* Burnett, 9 Cir., 1958, 262 F. 2d 55, 59; Nettles *v.* General Accident Fire & Life Assurance Corp., 5 Cir., 1956, 234 F. 2d 243, 247; Hassett *v.* Modern Maid Packers, Inc., D. C. D. Md. 1959, 23 F. R. D. 661, 664; Lyophile-Cryochem Corp. *v.* Chas. Pfizer & Co., D. C. E. D. N. Y. 1947, 7 F. R. D. 362, 363; Rickenbacher Transportation, Inc. *v.* Pennsylvania R. Co., D. C. S. D. N. Y. 1942, 3 F. R. D. 202, 203, Barron & Holtzoff, Federal Practice & Procedure, §943; 5 Moore, Federal Practice, par. 4203. Determining the order of trial issues is a function reserved to the trial judge, Gross *v.* United States, 9 Cir., 1953, 201 F. 2d 780, 784, and the granting of separate trials of distinct issues is within the sound discretion of the trial judge, Bowie *v.* Sorrell, 4 Cir., 1953, 209 F. 2d 49, 51, 43 A. L. R. 2d 781; see also Bedser *v.* Horton Motor Lines, 4 Cir., 1941, 122 F. 2d 406, 407; Hall Laboratories *v.* National Aluminate Corp., D. C. D. Del. 1951, 95 F. Supp. 323, 326; Eichinger *v.* Fireman's Fund Ins. Co., D. C. D. Neb. 1957, 20 F. R. D. 204; Grissom *v.* Union Pac. R. Co., D. C. D. Colo. 1953, 14 F. R. D. 263, 264; especially where such separation will tend to avoid prejudice, further convenience, promote justice and assure a fair and speedy trial to the litigants. 88 C. J. S. Trial §9a. . . ."

Petitioner presents no authorities for his belated contentions. He ignores *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54, (CA 2d) where Judge Frank examined the practice of special verdicts as opposed to general verdicts and strongly recommended special verdicts. Judge Frank fully documented his approval and his colleagues, Judge

Learned Hand and Judge Swan concurred. This opinion is frequently cited and is regarded as a milestone in the practice of trial by special verdict instead of general verdict. One paragraph of Judge Frank's opinion should be persuasive. It appears on page 67 and reads:

> • • • "Accordingly, we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, although we deem such a verdict usually preferable to the opaque general verdict. Perhaps some day soon Rule 49 will be amended to make compulsory either special verdicts or written interrogatories in civil jury cases. Meanwhile, we can but hope that, in such cases, the district judges will require one or the other, on their own motion or when asked to do so." • • •

It is abundantly clear from the foregoing that the court properly required a special verdict under the Federal Rules of Civil Procedure. The questions were relevant, clear and certainly not prejudicial to petitioner. Special verdicts are the recommended practice. Petitioner's counsel consented to the procedure adopted by the Trial Court and cannot now complain.

POINT III.

THE QUESTIONS SUBMITTED FOR DETERMINATION BY THE JURY ARE MATERIAL AND FREE FROM PREJUDICIAL ERROR. THEY WERE DIRECTED AT ASCERTAINING WHETHER IN FACT PETITIONER HAD MAINTAINED HIS BURDEN OF PROOF AS TO HIS RIGHT TO BE ON THE BARGE.

A.

It is first to be noted that the court charged that petitioner had the burden of proof that he was invited on

board the barge by its captain and that the captain had authority to do so, for purposes other than the furtherance of the legitimate business interests of the owner. (Pet.'s App. in the Court of Appeals 15a) Petitioner took no exception to this charge.

Petitioner offered no proof whatever as to the authority of the barge captain. Petitioner maintains that the bargee, who was in real fact little more than a watchman or deckhand on a dumb barge, had the same status as the master of an ocean going vessel.

The barge captain had no "apparent" authority. A large sign on the barge plainly stated that visitors are not permitted. This was pursuant to a U. S. Coast Guard regulation. (9a, 10a) Moreover, Esso's regulations forbade the bargee to permit visitors aboard. (9a, 5a) Thus the barge captain had no implied authority to invite persons on board the barge.

The captain denied that he extended an invitation and denied that he had the authority to extend one. (5a) Thus an issue was created which would be determined by the jury's response to questions numbered 1 and 2. The real fact is that petitioner came aboard the barge stealthily and was first discovered after he had pilfered a carton of milk from the barge's refrigerator. (2a, 3a) While it is quite true that petitioner was not immediately ordered from the barge he was nonetheless a trespasser. Permission to finish drinking the milk cannot be regarded as a change in petitioner's status. He was on the barge without invitation and for purposes which were inimical to both the barge and its crew. As Servilla testified, the best way to remove an unauthorized person is to treat him politely first and then request him to leave. (17a, 18a)

Moreover, as was fully admitted by the petitioner, vessels carrying petroleum products have hazards (not known

on other vessels) where precautions must be taken against open fires, smoking and the use of improper tools (15a, 16a). The bargees, as required by law, had special certificates as tankermen issued by the United States Coast Guard. (8a, 16a)

Petitioner lays great stress on *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625. The facts of the *Kermarec* case are totally different from those in the case at bar. Kermarec possessed a pass signed by the captain of the ocean-going S/S *Oregon* authorizing him to be on board the vessel. Thus he was an invitee and was visiting a fellow seaman in accordance with custom. Respondent's regulations forbade such practice. Petitioner knew that before one could lawfully board a vessel carrying petroleum products he must have a pass from the owner (15a, 16a).

Thus the *Kermarec* case is not an authority with respect to the case at bar.

The sole duty of Esso to petitioner was to refrain from willful or wanton injury. *Silverado S.S. Co.* v. *Prendergast*, 31 F. 2d 225, 226 (C. A. 9, 1929), cert. denied 280, U. S. 557; *Mistral*, 1932 A. M. C. 762, 767 (W. D. N. Y.); *Nimbus*, 1937 A. M. C. 972 (E. D. N. Y.). The last two cases are not officially reported. Petitioner does not charge that his injuries were the result of willfulness or wantonness.

In the *Silverado* case the Court said, page 226 (31 F. 2d 225):

> • • • "Generally a principal is liable for his agent's torts only if they are committed while the agent is carrying on his principal's business. If the agent steps aside from that business to promote purposes of his own having no connection with his employer's

business, the relation of agency is for the time being and to that extent suspended. And usually it is not within the implied authority of an agent to invite his personal friends to visit, enter upon, or make use of his principal's property; nor is a principal ordinarily liable for injuries suffered by third persons through the negligence of a servant who for purposes of his own has without authority invited, or permitted them to come upon the principal's premises." • • •

B.

Petitioner complained on appeal for the first time that the questions as to negligence were not added to the three questions actually submitted to the jury. He made no such request of the trial judge. He understood thoroughly that such questions would be put later should the jury's response to the three questions require it.

This belated complaint is now repeated in points IV and V of his brief (pp. 24-38). Petitioner charges that both counsel were misled by the Trial Court with respect to the questions which were to be submitted to the jury. His complaint is that only 3 of the 7 questions were actually submitted to the jury, although the court had said that 7 would be submitted.

Petitioner is wrong on all counts. The court carefully instructed counsel that only 3 questions would be first submitted to the jury and that depending on the jury's answers to these 3 questions, further questions would be put. Petitioner's counsel fully appreciated this and, indeed, consented to the action which the court took (Petitioner's App. in Court of Appeals 8a, 9a). The fact that he did not take any exceptions to the submission of only 3 questions is ample evidence that he was fully informed as to what action the court proposed to take. After the jury had rendered its verdict to the effect that petitioner was a trespasser on

Esso's barge with inimical intentions, the petitioner's counsel did not move to set the verdict aside on the ground that more questions should have been submitted to the jury. It is noteworthy that although petitioner's counsel says that he argued to the jury the full 7 questions, he does not include as an appendix to his brief his summation (or final argument) to the jury. He prefers to make the unsubstantiated charge that he was misinformed, or as he puts it "trapped" in the hope that he will be accepted at his word and that this Court will take some action on his word alone, and disregard the trial record. As a matter of fairness to this Court and the Trial Court, whom he unjustifiably belabors, petitioner should state some support for his charges. The Addendum to respondent's brief will demonstrate, without question, the incorrectness of petitioner's charges and statements with respect to the transactions on the trial.

The Court of Appeals stated (Pet.'s App. 51):

> "The inspection we have made [of the entire stenographic transcript] clearly demonstrates that appellant did not object to dividing the jury issue into two parts, nor did he object to dividing the issue of liability into two parts: (1) the status of the plaintiff on board, and (2) the question of negligence if the answer to the status question did not resolve the case. The Trial court made it clear before giving his charge to the jury that he would follow this procedure, and counsel acquiesced, as he did to the submission of the special interrogatories without a general verdict. Furthermore, after the charge was given to the jury, appellant made no objection to the form of the submission."

Once again petitioner failed to comply with Rule 51 of the Rules of Civil Procedure to make known to the court

his objections before the jury retired. His failure to do so bars him from asserting error now.

Blankenship v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455 cited on page 27 of petitioner's brief is completely irrelevant. There the court failed to instruct the jury concerning the relationship of the questions submitted so that the jury was left in confusion as to whether, although a vessel might have an unseaworthy condition, if plaintiff knew about it, the jury might not find that the unseaworthiness contributed to the accident.

In the case at bar the court clearly instructed the jury that irrespective of the answers which they would give to questions 1 and 2, he nonetheless wished them to answer question #3. This was an explicit instruction which made perfectly clear to the jury that the third question was in no way dependent on the jury's answers to questions 1 and 2. Moreover, even if the jury had answered question #3 in the negative, the court would still have had to grant respondent's motion for a directed verdict (Pet.'s App. 14a in the Court of Appeals).

C.

The final complaint which petitioner makes with respect to the questions is that the court's definition of the word inimical in question #3 was erroneous. The question reads as follows:

> "Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?"

The Court of Appeals correctly held that the additional charge to the jury as to the meaning of the word inimical was consistent with its meaning in the main charge to which

petitioner took no exception (Pet.'s App. 56). The Trial Court charged:

> "If you find the plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent, you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

The additional instruction was necessary because the jury asked the court to clarify the use of the word "inimical" and the phrase "for a purpose". The court gave counsel an opportunity to express views and petitioner's counsel asked the court to charge that the word "inimical" meant "hostile or harmful, and nothing more" (Pet.'s App. in the Court of Appeals 28a). The court instructed the jury that the word meant "inconsistent with" and the phrase "for a purpose" spoke for itself.

The Executive Desk Book published by John J. Winston Company in 1947 defines "inimical" as "unfriendly, opposed, antagonistic". Webster's New Collegiate Dictionary gives it a similar meaning. The word itself is from a Latin word meaning "unfriendly". Its use by the court as "inconsistent with the defendant's legitimate interests" was precise and proper.

The Trial Court correctly denied petitioner's counsel's request to direct the jury that the petitioner was on the barge for purposes not inimical to the interests of the vessel. The verdict of the jury in itself substantiated the

denial of this motion. As held in *Henry W. Cross Co.* v. *Burns*, 81 F. 2d 856 at page 58:

> "In considering the question of the alleged error of the lower court in refusing to direct a verdict in favor of defendant, it will be necessary to refer to the evidence. As to all controverted facts we must assume that the jury determined them in favor of plaintiff, and we must view the evidence in favor of plaintiff's cause of action in the most favorable light, giving to it such favorable inferences as may reasonably be drawn therefrom."

Bernal v. *Baptist Fresh Air Home Society*, 300 N. Y. 486, concerned itself with the duty owing to an infant who, for three years, had been attending a summer camp as a guest and who was injured while performing certain duties in the administration of the camp. The court there held that while plaintiff was a social guest to begin with, during her tenure in the camp she gained the status of a licensee. Here petitioner was not a social guest, nor was he a licensee but, in fact, he was, as the jury correctly found, a trespasser.

Cases such as *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396; *Butler* v. *Whiteman*, 356 U. S. 271; *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 and *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275, concern themselves with the questions whether or not the injured party was an "employee" under the FELA or a "member of the crew" under the Jones Act (46 USC 688).

Respondent readily admits that an objection is sufficient if it is properly made so as to inform the Trial Judge of any possible errors in order that he may have an opportunity to reconsider and correct them if necessary. However, as

the Court below rightly decided, petitioner failed in this respect.

Although Rule 51 does not require formality, the Trial Judge must at least be aware of the objector's position. As expressed in 5, Moore, Federal Practice, at page 2505:

> "• • • (A) mere general objection is insufficient 'where a party might have obtained the correct charge by specifically calling the attention of the Trial Court to the error and where part of the charge was correct' 9. (numerous cases cited)"

In those cases, such as *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904; *Greyhound Corporation* v. *Blakley*, 262 F. 2d 401; and *Green* v. *Reading Company*, 183 F. 2d 716, the reviewing courts found that the records indicated a sufficient compliance with the rules. Therefore, formal exceptions were held not to be necessary. Such is not the case in the record below.

Petitioner's failure to object to the charge of the court, respecting petitioner's inimical purpose on board the barge, bans him from raising the issue now.

This question, in real fact, was not necessary to a determination of petitioner's right to recover and even if the jury had answered the question in the negative, it could not have changed the result. The first two questions determining that petitioner was on board the barge without an invitation from the captain and that the captain had no authority to extend the invitation, alone, were sufficient for the court to direct judgment in respondent's favor.

POINT IV.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AS TO THE CONSTRUCTION OF RULES 49 AND 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

It is well recognized that it is within the discretion of the trial court whether to utilize the provisions of either Rule 49(a) or 49(b) or neither, depending on the complexity of the issues involved in the case. *Clegg* v. *Hardware Mut. Casualty Co.* 264 F. 2d 152 (5 Cir. 1959) *Employers Mut. Casualty Co.* v. *Johnson,* 201 F. 2d 153 (5 Cir. 1953).

This Court has passed on and approved, as more fully documented in Point II of respondent's brief, the constitutionality of Rule 49 of the Federal Rules of Civil Procedure. It was not necessary for the Trial Court to utilize the provisions of Rule 49(b) since its decision to follow Rule 49(a), which was approved by both counsel, was fully in accord with recognized practice.

Cases cited by petitioner in Point VI of his brief are not relevant to the facts in the case at bar. The action of the Trial Court in submitting the three questions for a special verdict by the jury was clearly proper in the light of the lengthy trial and extensive medical testimony adduced.

Moreover, there was no "piecemeal" submission of the issues in question, nor was petitioner's counsel "trapped" by the charge of the Trial Court. As mentioned earlier, petitioner's counsel felt that "in the main your Honor's thoughts should facilitate matters". Petitioner's counsel may not assert that his acquiescence in the charge of the court resulted in his "entrapment". As stated in *Levin* v. *Joseph E. Seagram & Sons,* 158 F. 2d 55, 58 (7 Cir. 1946) cert. denied 330 U. S. 835:

> "If counsel requests information as to the instructions and is not satisfied with the response of the court, before he can claim prejudice thereby he will have to do more than acquiesce in the court's response which he thinks unsatisfactory. *Dallas Ry. & Terminal Co.* v. *Sullivan*, 5 Cir., 108 F. 2d 581, 583."

Certainly, the various Courts of Appeal are not in conflict as to the construction of Rule 51 of the Federal Rules of Civil Procedure, for as was stated in *Downie* v. *Powers* 193 F. 2d 760, 766 (10 Cir. 1951) "• • • The requirements of Rule 51 are too plain for misunderstanding. • • •"

Petitioner's counsel's alleged exceptions to the charge of the Trial Court are, as the Court below rightfully found, conspicuously absent from the record. If there is anything about which the Courts of Appeal are unanimous, it is that the failure to object to instructions of a trial court, in the absence of fundamental error, precludes a party from raising this issue on appeal. *Downie* v. *Powers*, 193 F. 2d 760 (10 Cir. 1951); *Thorp* v. *American Navigation*, 212 F. 2d 821 (3 Cir. 1954); *McDonald* v. *Jarka Corporation*, 144 F. 2d 53 (2 Cir. 1944); *Greinke* v. *Yellow Cab Co.*, 250 F. 2d 865 (7 Cir. 1958); *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956).

As noted earlier in this brief, petitioner has failed to document his assertion that there is "great confusion and conflict of opinion" among the various Courts of Appeal. His failure to be specific warrants an abrupt dismissal of his charge.

CONCLUSION.

THERE WAS NO ERROR IN THE TRIAL BELOW OR IN THE COURT OF APPEALS. THE SPECIAL VERDICT WAS THE PROPER APPROACH TO THE DETERMINATION OF THE PETITIONER'S LEGAL RIGHT TO RECOVER, PARTICULARLY SINCE BOTH PARTIES AGREED. IT IS THE PROCEDURE RECOMMENDED IN CIVIL JURY TRIALS. THE QUESTIONS THEMSELVES WERE PROPER, CLEAR AND RELEVANT AND WERE GIVEN TO THE JURY UNDER APPROPRIATE INSTRUCTIONS. THE PETITION SHOULD BE DISMISSED.

Respectfully submitted,

WALTER X. CONNOR,
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Esso Standard Oil Company.

JAMES P. O'NEILL,
Counsel.

ADDENDUM TO BRIEF.

Excerpts from Testimony.

INGVALD TOLLEFSEN, called as a witness by third party defendant, being first duly sworn, testified as follows:

* * * * * *

Direct examination by Mr. Connor:

* * * * * *

(7) Q. Now, when you say you and your partner secured the ladder, what do you mean by that? (8) A. We brought the rope it is hanging on the ladder, we took the two ends with us up, stuck them over the rail of the *Parisminia,* and then back underneath again and down to the bottom again on the small boat, on the barge.

Q. And the purpose of that rope was to secure the ladder? A. Secure the ladder and hold it in place.

By the Court:

Q. Did I understand you to say that when you tied up alongside the *Parisminia* you made fast, then you took this ladder and put it alongside the *Parisminia,* and you and your partner went up this ladder? A. My partner went up and I stood down below.

Q. Your partner went up, and he took the rope which is shown on the picture? A. Yes.

Q. And he made it fast to the— A. He throw it over the rail of the ship, and then we took the ends through there and brought them back to the deck of the barge and made it fast so that the ladder was practically hanging on those two ropes so that it couldn't move. That is the way they all do it on barges.

(9) By Mr. Connor:

Q. What size ropes did you use for that? A. It is a two-inch rope.

Q. You better tell us what two-inch rope is now. A. Well, I guess it means two inches around. It is about the thickness of my three fingers together.

Q. Show us about how thick that would be. A. Well, it would be about between a quarter and a half a dollar size. That is the best I can tell you. It is a three-strand rope.

Q. That would be the diameter of the rope? A. Yes.

Q. And what kind of material was the rope made of? A. Regular manila.

Q. And is manila the kind of rope that is normally used for tying up and securing things? A. It is used for everything, lines and everything.

Q. Now, after you had put the ladder up, where did Mr. Sevilla go? Or did he remain there? A. No. He came down.

Q. Down the ladder? A. Down the ladder and down back on the barge.

(10) Q. And then what happened? A. And then he started to clear up the deck. There is always lines lying coiled up all around and we clear the decks so that we don't get tangled up in it, and we went over there and done that, and then my partner says, "Don't go in, Captain. You do your book work because you have to take care of the log-book" and so forth.

We put everything on a pad and then, when we have a chance, we fill it in in the book.

Q. And did you then go into the cabin? A. Yes.

Q. And when you went into the cabin, what happened, if anything? A. Well, then I saw the watchman was in the cabin.

Q. And what was he doing there? A. He was drinking milk out of a container.

Q. And prior to the time that you saw him with the container of milk, where had the container been? A. In the frigidaire, our frigidaire on the barge.

Q. You have a refrigerator on the barge? A. Yes.

(11) Q. And did you say anything to him? A. Well, I says, "What are you doing here?"

He says he wanted some coffee. I thought he meant a cup of coffee. So I said, "Well, that's in the coffeepot there, if you want a cup."

He says, "No," he wanted dry coffee to take with him.

Q. And then what happened? A. So I asked him what he was going to do there, so he said, well, he was going to go up again.

But I gave him a glass and I said, "You may as well drink that milk up now because you have been drinking out of the container and we don't want to have that."

So he drank up the milk. And in the meantime I sat down at the table and I got a hold of my book and started to do the work.

So he told me he lived in Hastings and he had two jobs, he said, so there wasn't much said; I guess that's about all.

So I said, "You better get upstairs and get on the ship, because that's where you work." So he went out.

Q. What did you do then? (12) A. He went out and went up.

Q. And then what happened after that? A. I told him that my partner was out on deck, so he went out and after a while I hear some footsteps on the deck there, and I hear like a little bang, and of course you hear so much like that on boats, but I got up and I went out, and my partner was over by the rail, and he helped the watchman up.

Q. Where was he? Where was the watchman? A. The watchman was lying on the deck.

Q. Where on the deck? A. At the foot of the ladder, right by the railing. The railing you can see on the pictures there.

* * * * * *

(13) Q. Will you indicate to me where those ropes are that you referred to? We will take the bottom of the ladder first. A. They are made up fast here. You can see it on some of these. The ropes are spliced right into the ladder up here, so if you want to make it fast you throw it over the

rail and then you see how the rope comes down here and here they are, and you make them fast right down here and you can handle the ladder (14) from the barge. You don't have to run up and down.

• • • • • •

(16) Q. And then what was done? A. We lifted him up there. He was all right. So I went in the cabin and took one of the cabin chairs out and let him sit down on the chair.

Q. And did you ask him about what happened to him? A. Yes. I said, "What happened?"

He said he fell off the ladder.

Q. Did you ask him whether he was hurt? A. Yes.

Q. What did he say? A. Well, "Yes." One of his fingers was bleeding a little there, and he had kind of a scratch on his head there. So I put some tape on his finger; it was bleeding.

Q. You mean a band-aid? (17) A. Yes. But I didn't put anything on his head because it was a little scratch.

Q. How big was the scratch you saw on his head? A. I would say about an inch, or a little more. About an inch wide. It was just like a scratch.

Q. Was there any blood coming from it? A. No, but it was red. But there was no blood.

Q. And then what happened? A. Well, I got his name and address and telephone number, and he said he had to get himself up again because he had to relieve the gangway watchman.

I said, "Are you all right?"

So he said, "Yes."

So he went over to the ladder and he walked up himself.

Q. You did not help him up? A. No.

Q. Mr. Sevilla did not help him up? A. No. We stood down and held the ladder.

• • • • • •

Ingvald Tollefsen, for Third Party Defendant—Direct.

Q. And were the ropes on the ladder at that time? (18)
A. Yes, sir.

Q. Had they ever been taken off? A. No, sir.

Q. Now, it has been testified by Mr. Ribiero that after your barge came alongside of the *Parisminia*, you had a conversation with Mr. Ribiero about coming down on the barge. Did you ever have any such conversation? A. No, sir.

Q. Did you ever invite Mr. Ribiero down on the barge? A. No.

Q. Have you any authority to invite people on the barge? A. No, sir.

Mr. Rassner: That is objected to, your Honor. I move the answer be stricken.

The Court: Motion granted.

By Mr. Connor:

Q. Do you have any written instructions with respect to visitors coming on board the ship?

Mr. Rassner: That is objected to, your Honor. Not binding on the plaintiff.

The Court: Overruled.

(19) A. Yes, sir.

Q. And do you keep a copy of those orders on your vessel? A. Yes, sir.

Q. In addition to that, do you have any signs on your vessel about visitors? A. Yes. We have a sign about midships.

Q. That is about the middle of the ship? A. About the middle of the boat, yes.

Q. What does it say on the sign? A. It says, "No smoking, no open fires, and no visitors."

Q. Are open fires or smoking dangerous on the kind of a vessel that you were on, that barge? A. Well, it could be.

Q. What do you mean, "it could be"? A. Well, I suppose there would be fumes enough in there, gas, especially if the oil is hot.

Q. Well, what would happen if you had fumes and you had an open flame? A. Well, it could explode. That is why we are not allowed to smoke anywheres outside.

Q. Would it blow the ship up? A. Well, it could.

(20) Q. It could also blow up the ship that you were tied to? A. Well, I don't think it would be that bad, but it could happen.

Q. Have you ever been on a ship that was in an explosion? A. No, but I have seen it.

Q. And you have seen vessels which have had explosions? A. Yes, but there has been different oil. There has been gasoline. But this is the way the Coast Guard gives you the signs and everything.

Q. The Coast Guard has some regulation about it? A. Yes.

• • • • • •

(22) Q. Now, when you came out on deck after you heard the running feet, what was the position of the ladder at that time? A. After I came out on deck?

Q. Yes. A. It was in the same position that it was before.

Q. Were the ropes still tied to it? A. Yes.

• • • • • •

(23) Q. Do you know how Mr. Ribiero got down on the deck of the barge? A. No. He must have come down on the ladder.

Q. You think he did; is that it? A. Yes.

Q. You did not see him? Q. No, I didn't see him.

Q. The first time you saw him on the barge was when you saw him drinking out of the carton of milk; is that right? A. That's right.

• • • • • •

Ingvald Tollefsen, for Third Party Defendant—Cross.

Cross-examination by Mr. Rassner:

• • • • • •

Q. You don't send a man up to the *Parisminia* to watch the lines on the *Parisminia*, do you? A. No, sir.

Q. Whose job is that, to watch the lines on the *Parisminia*? A. Nobody watches the line.

Q. All right. That is your testimony: nobody watches it. A. That's right.

By the Court:

Q. Tell us what it means to watch lines. A. I don't know what he means. But he must mean take slack in, you know, tighten them up if it is too much, or if they get too tight——

Q. Is there any way of taking the slack in up on top? A. No.

Q. You can't take it in? A. No, there is nothing there. It is just spliced, a small eye in there.

• • • • • •

(42) Q. There is an eye on the end of the hawser which goes up on the *Parisminia*? A. That is right.

Q. That can't be slackened, it can't be tightened on the *Parisminia*? A. No.

Q. Somebody must go down on the barge or be on the barge to loosen or slacken the line as needed, isn't that so? A. Yes.

Q. That's got to be done on the barge? A. On the barge, yes.

• • • • • •

(43) By the Court:

Q. Who takes care of the lines on the barge? A. We do, the crew on the barge takes care of the lines and nobody else is supposed to come down and touch no lines.

Q. Do they come down? A. No, nobody comes down.

Q. That is your job? A. That is all.

Q. Do they ever come down? A. No, sir.

Q. Did they come down on this day? A. No, sir.

(44) Q. Would they have any business on your vessel? A. No, sir.

(64) By the Court:

Q. Had the ladder fallen on top of him, too? A. No. the ladder was still there.

Q. Had the ladder moved in any way? A. No, I didn't notice that it moved anywheres.

(68) *Re-direct examination by Mr. Connor:*

Q. I just want to ask you one or two questions, Captain. I forgot to ask you before. Do you have (69) any master's license issued by the United States Coast Guard? A. No, sir.

Q. Do you have any chief officer's license? A. No, sir.

Q. Do you have any kind of a document issued by the United States Coast Guard? A. Yes.

Q. What kind of document is that? A. I have an AB seaman for any ocean, and I also have lifeboat ticket, and I have tanker license, to operate petroleum boats, that carries petroleum, oil boats.

Q. In other words, you have a certificate from the United States Coast Guard? A. Yes, sir.

Q. Which permits you to go to sea as a sailor aboard a ship? A. Any ship, any ocean.

Q. And then you have what you call a lifeboat ticket, which certifies that you are competent to handle a lifeboat? A. That's right.

Q. And then you have an endorsement on your sea-(70) man's certificate saying that you are qualified to sail on vessels carrying petroleum products? A. Yes, sir.

Amedeo Giallorenzi, for Third Party Defendant—Direct.

AMEDEO GIALLORENZI, called as a witness by third party defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Connor:

* * * * * *

(86) Q. The question was: Are barge captains permitted to invite persons on board the barges for social reasons? A. No, sir.

Q. For example, is the captain permitted to invite a watchman from another ship to board the barge for the purpose of giving him milk or coffee? A. No, sir, no one.

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(89) Q. And can you tell us whether or not the Esso barge 23 has any sign on it with respect to visitors?

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A. Yes, sir. The 23 and all of our company barges are so posted. In fact, all tank barges in the industry are posted, and that is—all tank barges are under the supervision and inspection of the United States Coast Guard, Marine Inspection, and one of the requirements is th[illegible]ach tank barge—all tank barges are to be posted with a sign stating "No smoking, no fires and no visitors." And all of our equipment which is inspected periodically by the Coast Guard is (90) so equipped.

Q. And is there any additional hazard on an oil barge as compared with barges that carry gravel and bricks and so on? A. Well, I think the nature of the cargo itself might answer that question.

Q. Maybe it does, but is it a hazard or isn't it? A. Yes, definitely.

Q. And do you know whether or not the fact that such cargo does present a hazard on oil barges is one of the reasons why you prohibit the barge captains from having social visitors on board? A. Exactly. I mean, the inherent dangers in handling of petroleum products is the reason for

the Coast Guard's requirement that visitors who might be unacquainted and unaccustomed to handling petroleum products be excluded.

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JOAQUIM RIBIERO, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. Rassner:

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(269) Q. Did you have a conversation with the captain of the barge? A. Yes.

Q. What did you say to him and what did he say to you? A. He said "You feel cold? You want to come down and get a cup of coffee?"

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(273) Q. How did you get off the barge and go home? Tell us how you did that. A. I climbed the ladder. The captain hold the ladder for me.

Q. Go ahead. A. When he finished the bandage, pick it up to me.

Q. Go ahead. Then what did you do? A. I tell the night mate. He say my work finished, so all right I go home.

Q. Did you tell the night mate you had an accident? A. No.

Q. You left the *Parisminia* and you went home, is that right? A. That's right, yes.

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(300) *Cross examination by Mr. Hampton:*

Q. As I understand, Mr. Ribiero, on the 9th day of May 1955 you worked for the Transportation System as a maintenance man, is that right? A. That's right.

Q. And what time of the day on May 9, 1955 did you go to work as a maintenance man for the Transportation System? A. Yes.

Q. What time of day? A. Eight to four, eight o'clock in the morning to—eight to four.

Q. So you got to the job at eight o'clock in the morning, your job as a maintenance man for the (301) Transportation Department, eight o'clock in the morning of May 9, 1955, is that right? A. Yes.

Q. How did you get to the job that day from your home in Hastings? A. I get off the job, the IRT, four o'clock.

Q. How did you get to the job from your home in Hastings? How did you travel to your job that day, that morning? A. I travel with the subway.

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(302) Q. And when you got home how did you find out about a job that you had to go to that night as a watchman? A. My wife say, "Call Mr. Phillips, Pier 92. He say got a job for you."

Q. Did you call Mr. Phillips? A. Yes.

Q. And as a result of the call or the telephone conversation you had with Mr. Phillips you found out that you had to report to work at Pier 7, North River that night, is that right? A. Yes, yes.

Q. What time on the evening of May 9, 1955 did you leave your home? A. Yes.

Q. What time did you leave your home to get to (303) the job as a watchman? A. Ten o'clock.

Q. And how did you travel from your home in Hastings down to the job that night? A. With a bus. The bus, get a subway. I get off at Bowling Green.

Q. And then when you got off at Bowling Green you walk over to Pier 5, as I understand it— A. That's right, get a pass.

Q. —and you got a pass. And then, after you got your pass you walked up to Pier 7. A. That's right.

Q. And you went onto Pier 7 where the *Parisminia* was berthed, is that right? A. That's right.

Q. And you boarded the vessel by means of a gangplank, from the pier to a vessel, is that right? A. That's right.

Joaquim Ribeiro, Plaintiff—Cross.

Q. When you got to the *Parisminia* how many gangplanks did you observe— A. One.

Q. —from the pier to the *Parisminia?* A. Just one gangway.

Q. And this was the only gangplank from the pier (304) to the boat by means of which you got to your job as a watchman on board that vessel, is that right? A. That's right.

* * * * * *

(311) Q. And, of course, being a union member, as a watchman there are certain rules and regulations that you observe as required under the union in which you belong as a watchman, isn't that so? A. Yes.

Q. And these union rules define your duties as a watchman when you are performing those duties on board a vessel, isn't that so? A. Yes.

Q. And you always, when you are watching on a vessel as a watchman, observe those union rules and regulations, isn't that so? A. Yes.

Q. One of your duties as a watchman, is it not, is to protect the gangplank, and by that I mean to insure or to make certain that people who have no business on board (312) that vessel do not board that vessel; isn't that right? A. Yes.

Q. And during your watch between 11 o'clock at night or 12 o'clock at night to 7 o'clock the following morning you are constantly patroling the various decks on board that vessel; isn't that right? A. That's right.

Q. And you are also constantly watching and looking at the gangplank to make certain that people do not get on that boat; isn't that so? A. That's right.

* * * * * *

(313) Q. When he asked you about mate, do you know what mate he talked to you about? A. My boss, the night mate.

Q. Your boss on the *Parisminia.* A. That's right.

(314) The Court: All right.

Joaquim Ribiero, Plaintiff—Cross.

By Mr. Hampton:

Q. With respect to your job where you are on duty patroling the various decks and watching the gangplank, is it not a fact, Mr. Ribiero, that under no circumstances are you permitted to leave your post or leave your vessel or leave the boat? Isn't that right? A. That's right.

Q. And if you did for any reason or on any occasion have to leave the vessel you would first have to report to your boss, as you speak of him, the night mate, and get permission from him before you could leave the vessel, isn't that so? A. That's right.

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(334) Q. Did you see the mate of the vessel *Parisminia* whom you call your boss before you went down to get coffee? A. No.

(335) Q. He didn't even know you went down to get coffee, did he? A. No.

Q. As I understand it, your job as a watchman aboard a vessel is for the security of the vessel against fire, against theft, isn't that so? A. That's right, yes.

Q. Your job is an important one in that respect, isn't that right? A. Yes.

Q. Your job might mean the saving of lives and property, isn't that right? Isn't that right? A. That's right, yes.

Q. And you went down to the barge for a cup of coffee and you left your post, didn't you? You left the boat, didn't you? A. Yes.

Q. You left your tour of duty; you left your post, didn't you? Didn't you? A. Yes.

Q. And how long were you down on that barge with the captain? A. I get a cup of coffee in the galley. I stayed five minutes.

(336) Q. And for five minutes in the galley of that barge there that vessel *Parisminia* was left unprotected, wasn't it? Wasn't it? A. Yes.

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(340) Q. And since it was about quitting time, the first thing you did then was to go and see the mate of the vessel *Parisminia* so that he could sign you off, is that right? A. That's right.

Q. And you saw the mate and you were signed off by him? A. Yes. He say O. K.

Q. And you never told the mate of the *Parisminia* about this accident you had on the barge, did you? A. No.

• • • • • •

Q. You know as a watchman licensed by the Waterfront Commission that it is a violation to leave your post while you are on duty, isn't that so? (341) A. Yes.

Q. Isn't that right? A. That's right.

Q. And for that violation your license could be lifted. You knew that, didn't you? A. Yes.

Q. And if you told the mate that you were off that boat for a period of time that mate could make a complaint which would cause you to lose your license, isn't that right? A. Right.

Q. Isn't that right? A. Yes

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(348) Q. After you had gotten your discharge for your day's work from the night mate of the *Parisminia*, then you left the boat; isn't that right? A. That's right.

Q. And you left the boat on the same gangplank which was located at the starboard side of the *Parisminia* to Pier 7 that you went on the boat; isn't that so? A. Yes.

Q. That same gangplank. A. Yes.

Q. That gangplank that was there for you and others to use to get on and leave the boat; isn't that right? A. All the time, yes.

Q. What? A. All the time.

Q. And from Pier 7, then where did you go? A. I go home.

Q. To Hastings? A. I go to work.

Joaquim Ribiero, Plaintiff—Cross.

Q. You went home to Hastings. A. No, I go to work, IRT.

Q. You went home first? A. No.

. . . . . .

(356) Q. Did you go to work at all on May 12th? A. Yes.

Q. Well, if you saw the doctor on May 11th, did he treat your back for you? A. He send me in General Hospital, Dr. Fabiani.

Q. Did you tell Dr. Fabiani about your back? A. Yes.

. . . . . .

Cross-examination by Mr. Connor:

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(410) Q. Did you ever work on an oil tanker? A. Yes.

Q. And from your experience working on an oil tanker, is it necessary to be careful of what you do so that you don't cause fires on a vessel carrying oil? A. Yes.

Q. You have to be careful about smoking, don't you? A. Yes, stop smoke.

Q. And you have to be careful about not having — A. Right.

Q. —any open lights, right? A. Yes.

Q. And you also have to be careful about the kind of tools you use on a tanker, don't you? A. Yes.

Q. Did you ever hear of non-sparking tools? A. Yes.

. . . . . .

(411) Q. There is always a great danger that the barge or the oil tanker might blow up, isn't that true? A. Yes.

. . . . . .

Q. When you were working on a tanker, even back thirty years ago, wasn't it the practice of the company not to allow people on board the big oil tanker unless they had a pass?

Mr. Rassner: That is objected to, particularly in view of the invitation.

The Court: Objection overruled.

Q. So you know that it is the practice on oil ships (412) that before one goes on the ship he should have a pass of some kind; isn't that so?

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Q. Isn't that so? A. Yes.

Q. And you knew that before you went down on the barge, didn't you?

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Q. Isn't that so? You did know that. A. Yes, I know.

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(441) STEPHEN SEVILLA, called as a witness on behalf of the defendant Esso Standard Oil Company, having been first duly sworn, testified as follows:

Direct examination by Mr. Connor:

Q. Mr. Sevilla, by whom are you employed? A. When I was employed?

Q. No. By whom are you employed? A. By the Esso Oil Company.

Q. And what is your job? A. I was a third mate.

Q. Do you have any license issued by the United States Coast Guard? A. Yes, I have.

Q. What have you got? A. I got a tanker man ticket and a lifeboat ticket.

Q. A tanker man's ticket and a lifeboat ticket? A. Yes.

Q. And a tanker man's ticket, as I understand it, permits you to sail on vessels carrying petroleum products. A. That's right.

By the Court:

Q. Are you also an able bodied seaman? A. No, I haven't got that.

Q. You haven't got that? (442) A. No.

Q. Do you have an ordinary seaman's certificate? A. Ordinary seaman I have.

Stephen Sevilla, for Defendant—Re-direct.

Q. You have ordinary seaman but not able bodied seaman. A. That's right.

Q. AB is higher than OS? A. That's right.

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(452) Q. Did you remain with the captain while he talked to Mr. Ribiero as he sat in the chair? A. He brought the chair out. I stayed a little while there until he bandaged his finger. I noticed his right thumb was bleeding. So the captain went in—I don't know whether he got iodine or alcohol, but he put something on it. He put a band-aid on his right thumb.

Q. Did you notice anything else about him? A. No, I didn't.

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(455) Q. And did you watch him go up the ladder? A. Yes, he went right up the ladder just like an ordinary man would do.

Q. Aside from this one time that you tied the ladder up, do you have occasion to go up and down the ladder with your barge up against a ship? A. Going up the ladder?

Q. Yes. A. Oh, yes, we go up, call up, report to the boat what time we think it will be finished and give them an idea just what's what, give the company an idea.

Q. That is so a tug can come and take you away? A. Correct.

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Re-direct examination by Mr. Connor:

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(507) Q. In connection with unauthorized persons coming aboard the ship such as the way you were tied up that day against the *Parisminia*, suppose a man comes down on the deck of the ship and you see him and you say, "Well, get off the ship" and he says "No, I won't." What do you do about it? Do you carry him up the ladder? A. No, I would ask him in a nice way. "Look," I say, "what do you want

in the first place?'' I would inquire first what he want. And if he ain't got no business on the ship—because sometimes we have repairmen come down to repair the Frigidaire or dynamo or engines or something, and if he ain't got no business on the boat then I ask him in a nice way to get off the barge.

Q. And do you find that asking him in a nice way and treating him like a gentleman is the easiest (508) way to get him off the barge? A. That is the only way.

Mr. Rassner: I object to that. That is going far afield.

The Court: Objection overruled.

Q. Did you answer that question?

The Court: Yes. He said that is the easiest way.

The Witness: That is the best way to get anybody off.

The Court: He has found being a gentleman is the best way to get along in this world.

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EXCEPTIONS TO THE CHARGE.

(535) Mr. Rassner: Plaintiff takes exceptions to your Honor submitting questions 1 and 2 to the jury on the ground that neither question is a proper question in the case at bar. They are irrelevant, immaterial and outside the issues in this case.

The plaintiff takes exception to so much of his Honor's charge as makes a distinction between the (536) captain and mate on the barge and the captain and mate on a merchant vessel.

The plaintiff takes exception to so much of the Court's charge as comments on the fact that there is a question in the case of more than one ladder.

Plaintiff takes exception to so much of the Court's charge as comments on the written instructions on the

Exceptions to the Charge.

ground that it is error to accept or receive into evidence any evidence relating to written instructions by the owner to the master of the vessel.

Plaintiff takes exception to so much of the Court's charge as speaks of the Coast Guard regulations or any matters relating to the Coast Guard as any evidence received bearing on that question was erroneously received.

Plaintiff takes exception to so much of the Court's charge as makes comment—this has particular reference to question No. 3—on the conversation had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted; furthermore, that any conversation that took place before there was this absolute change of (.37) status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters, changed the status, if there were a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest.

Plaintiff takes exception to so much of the Court's charge as states that the plaintiff had no witness to support his contention as to the manner of the happening of the accident or any other.

. . . . . .

(539) The Court: It isn't a question of whether you are right or wrong. I am not determining whether you are right or wrong. I am trying to get what you want to raise because, if I did err, I want to have an opportunity to correct that.

. . . . . .

Mr. Rassner: He slipped from the ladder.

(541) The Court: All right, there is no question about that. I am not submitting that issue. That is on the question of negligence. That comes later. I am not submitting

that to them at this time. The only issues are these issues now: Was he an invitee? Did the captain have authority? Was it or was it not for a purpose inimical to the legitimate interests of the owners? Those are the only issues.

Mr. Rassner: I have made my objections on the (542) record. Now I have one more: that there be a direction as to the third question and a direction that the plaintiff was aboard barge 23 for purposes not inimical to the interests of the barge owner as there is no dispute that he was there for purposes not inimical to the interests of the vessel.

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COLLOQUY BEFORE CHARGE.

(562) Mr. Connor: Do I understand your Honor is going to limit our summations to the matter of liability?

(563) The Court: The summations at this time are to be limited to matters of liability because, as the Court previously indicated, the matter will be submitted to the jury on special issues. The first special issues will deal only with the subject of liability and if the verdict returned by them indicates they find there is liability, then we will go into damages.

The Court feels it is a matter of discretion, and in the interests of having an orderly trial and an intelligent verdict, in view of the disproportionate length of time taken on proof of damages and the relatively shorter time taken on the question of liability, that it is indicated here, in the interests of justice to both sides, not to have a general verdict but to have a special verdict in two parts.

The first questions to be submitted to them, and you will confine your summation, gentlemen, to that, is, first, did the Captain of Esso Barge No. 23 invite the plaintiff aboard the barge? Second, if your answer to the first question is yes, next question: Was the invitation extended with the authority and consent of the owner of the barge?

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